92-255

Supreme Court, U.S.
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No. 92-

In The

Supreme Court of the United States

October Term, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,

Petitioners,

vs.

CONCEPCION S. WABOL and ELIAS S. WABOL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARYBETH HERALD
Counsel of Record
for Petitioners
2121 San Diego Avenue
San Diego, California 92110
Telephone: (619) 297-9700

JOE HILL
P.O. Box 917
Saipan, MP 96950

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1. Where Congress granted persons in the Commonwealth of the Northern Mariana Islands the rights guaranteed by the equal protection clause, with the exception of the right to be free of racial classifications in purchases and long-term leases of real property, does this exemption in and of itself violate the equal protection component of the due process clause?

QUESTION 2. Does the Ninth Circuit's decision in this case – holding that the equal protection of the laws is not fully applicable in the Northern Mariana Islands – conflict with the Supreme Court's decision in *Examining Board of Engineers v. Flores de Otero,* 426 U.S. 572 (1976), which held that equal protection of the laws – whether protected by the equal protection clause or the due process clause – is a fundamental right applicable to unincorporated territories?

QUESTION 3. Assuming that the Congress had the authority to extend the equal protection clause to the Northern Mariana Islands in a racially exclusionary manner through Covenant §805, does this power extend to immunizing from judicial scrutiny the Commonwealth's implementation of Section 805?

QUESTION 4. Does the Commonwealth's implementation of Covenant §805, through Article XII of the Northern Mariana Islands Constitution, exceed the scope of any equal protection exemption contained in §805?

QUESTIONS PRESENTED FOR REVIEW – Continued

QUESTION 5. Assuming that the Ninth Circuit correctly held that full equal protection guarantees do not apply in the Northern Mariana Islands, did it misapply its own test by finding that granting the right to own property free of racial discrimination in the Northern Mariana Islands would be impractical and anomalous where it based its determination on past and not current conditions?

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STATEMENT OF GROUNDS FOR JURISDICTION

The Ninth Circuit Court of Appeals entered its first opinion on February 20, 1990. Both appellants and appellees filed timely petitions for rehearing following the issuance of the first opinion. The Ninth Circuit subsequently filed an amended opinion on July 9, 1990, but did not act on the petitions for rehearing. The Ninth Circuit filed a second amended opinion on March 16, 1992, but did not act on the petitions for rehearing. On May 29, 1992, the Ninth Circuit denied the petitions for rehearing and rejected the suggestions for rehearing en banc. App. 70.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).[1]

STATEMENT UNDER RULE 29(b), (c)

Because the proceeding draws into question the constitutionality of the Covenant to Establish a Commonwealth of the Northern Mariana Islands In Political Union With the United States of America. Act of Mar. 24, 1976, Publ.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note, an Act of Congress and the United States or any department, office, agency, officer, or employee thereof is not a party, it is noted that 28 U.S.C. §2403(a)

[1] In compliance with United States Supreme Court Rule 29.1, it is noted that neither Philippine Goods nor Transamerica Corporation have parent or subsidiary corporations.

may be applicable. Because the proceeding draws into question the constitutionality of Article XII of the NMI Constitution and the Commonwealth, or any agency, officer, or employee thereof is not a party, it is noted that 28 U.S.C. §2403(b) may be applicable.

No court has certified to the United States Attorney General or the Commonwealth Attorney General that the constitutionality of the Covenant or Article XII of the NMI Constitution have been drawn into question.

Covenant §805, Article XII of the NMI Constitution and other Constitutional, Covenant, and statutory provisions have been set forth in the Appendix, pages 71-78.

STATEMENT OF THE CASE

A. Historical Background

This case involves the Commonwealth of the Northern Mariana Islands. The Northern Mariana Islands consist of fourteen small volcanic islands in Micronesia. Between 1947 and 1986, the United States governed the Northern Mariana Islands (NMI) under the United Nations Trusteeship Agreement for the Former Japanese Mandated Islands. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 3, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

Subsequent negotiations between the NMI and the United States culminated in a relationship defined by the Covenant to Establish a Commonwealth of the Northern Mariana Islands In Political Union With the United States of America. Act of Mar. 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note. The United States now has a close and enduring political relationship

with the NMI. *See* Covenant §101 (NMI will be "in political union with and under the sovereignty of the United States.") The United States terminated the Trusteeship on November 3, 1986. Proclamation No. 5564, 51 Fed. Reg. 40, 399 (1986). The United Nations Security Council terminated the Trusteeship on December 22, 1990. S.C. Res. 683 U.N.SCOR, 45th Sess., 2972d mtg. at 29 (1990).

United States citizenship was extended to Trust Territory citizens and others living in the NMI when the United States terminated the Trusteeship in 1986. Covenant §301. In addition, all persons born on NMI soil now automatically become US citizens. Covenant §303.

Section 805 of the Covenant requires the NMI to restrict the alienation of "long term interests" in land to persons of Northern Marianas descent. The terms of §805 are patently racial. *See* App. at 1, 9; *Wabol v. Villacrusis*, 958 F.2d at 1451, 1455 (describing restriction as race-based). Section 501 of the Covenant extends various constitutional protections in the NMI, including the Fifth and Fourteenth Amendments, but purports to exclude Section 805 from the reach of the equal protection clause.

To implement §805, the NMI enacted Article XII of the NMI Constitution on January 9, 1978. App. 74-76. Article XII, §1 provided that the "acquisition of permanent and long term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent."

Section 3 of Article XII defined a "long term interest in land" as a "leasehold of more than forty years including renewal rights." The NMI then amended Article XII, §3 in 1985 to re-define a "long term interest" in land as a leasehold of more than fifty-five years and also permitted persons not of Northern Marianas descent to acquire condominium interests above the first floor. *See* NMI

Const., art. XII, §3 (as amended by 1985 Constitutional Convention Amendment 35.) App. 76.

Section 4 of Article XII defines a person of Northern Marianas descent. Section 5 defines corporations of Northern Marianas descent.[2] Section 6 of Article XII provides that "[a]ny transaction made in violation of Section 1 shall be "void ab initio."

B. Procedural History

Philippine Goods, Inc. is a corporation organized under the laws of the Northern Mariana Islands and with its principal place of business in the Northern Mariana Islands. It leased land in the Northern Mariana Islands in 1978. The lease is for a term of thirty years with an option to renew for twenty years. The option has never been exercised.

In 1985, Concepcion and Elias Wabol ("Wabol") filed suit in the Commonwealth Trial Court as owners of the leased land, to void the lease. They claimed that the lease was invalid under Article XII of the NMI Constitution, which limits the acquisition of long term interests in land in the NMI – defined as 40 years or less at that time – to persons of Northern Marianas descent. Philippine Goods did not come within Article XII's definition of "Northern Marianas descent," because only 50% of its stock was held by persons defined as of Northern Marianas descent and two of its three directors were not persons of Northern Marianas descent. App. 75.

The Commonwealth Trial Court granted Wabol summary judgment on the claim and held that Philippine

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[2] That section was also amended in 1985. *See* App. 76-77.

Goods' lease with Wabol violated Article XII. The Commonwealth Trial Court held that Covenant §805 and Article XII of the NMI Constitution, limiting the alienation of land in the NMI to persons of Northern Marianas descent, passed equal protection scrutiny. App. 53-66. Finding that the "equities strongly favor[ed]" Philippine Goods, the Commonwealth Trial Court held, however, that the lease was void only as to the term in excess of over forty years, and upheld it as a thirty year lease, with an option to renew for ten years. App. 66-68. Both parties agreed to a stipulated final judgment on February 18, 1986. All parties appealed the decision to the Appellate Division of the federal District Court for the Northern Mariana Islands, which had jurisdiction at the time pursuant to Covenant §402(c) and 48 U.S.C. §1694(b).

The Appellate Division also held that Covenant §805 and Article XII of the NMI Constitution did not violate the equal protection clause. App. 39-42. The Appellate Division held, however, that Phillipine Goods' lease with Wabol was void and incapable of reformation. App. 37. The Appellate Division then remanded the case to the trial court for a resolution of the equities in light of the voiding of the entire lease. App. 45-46.

On February 20, 1987, Philippine Goods and defendants Victorino Villacrusis and sublessee Transamerica Corporation (collectively referred to as "Phillipine Goods") appealed the decision to the Ninth Circuit Court of Appeals, which had jurisdiction over decisions of the Appellate Division of the federal District Court for the NMI, pursuant to federal law. 28 U.S.C. §1291; 48 U.S.C. §1694b(c). The Ninth Circuit heard oral arguments in May, 1988.

Before the Ninth Circuit issued a decision, the NMI Legislature passed a law creating an NMI Supreme Court and purporting to "pull back" to that court all decisions from NMI courts then pending in the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Appellate Division of the federal District Court for the NMI. NMI Pub.L. No. 6-25, §3109.[3]

No cases from the NMI were pending in the United States Supreme Court on the date of passage of NMI Pub. L. No. 6-25. On February 20, 1990, the Ninth Circuit issued its opinion in this case and held that the NMI legislature had no power to divest a federal court of its jurisdiction over a case pending before it. App. at 11-17. The Ninth Circuit could find "nothing in the Covenant" that granted the NMI the authority "to amend or circumvent the express [federal law] provision that all appeals from the appellate division of the district court must be heard by [the Ninth Circuit] without limitation." App. at 15-16. It concluded that federal law invalidated that part of the NMI Judicial Reorganization Act that attempted to divest the Ninth Circuit of its jurisdiction over pending cases and to require them to be heard exclusively in the Commonwealth Supreme Court.[4]

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[3] Congress agreed in the Covenant to create a federal district court for the Northern Mariana Islands. To allow time for the formation of a local court system, Congress agreed that the federal district court would also serve as a trial and appellate court for the local NMI cases, in addition to having the jurisdiction of a district court of the United States. Covenant §402.

[4] The Ninth Circuit later held that the NMI legislature did have the power to divest the Appellate Division of the federal

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The Ninth Circuit also found that the decision of the Appellate Division of the District Court voiding the lease agreement, was a final, appealable order, although the Appellate Division's decision remanded the case to the trial court for a resolution of the equities. App. 6-11. The Ninth Circuit then affirmed the merits of the case on a basis not discussed in the lower court decisions – that the land alienation restriction was not subject to equal protection attack. App. 17-29.

Both appellant Philippine Goods and appellee Wabol filed petitions for rehearing with suggestions for rehearing *en banc*. Philippine Goods based its petition on the merits of the court's decision and did not object to the Ninth Circuit's jurisdictional ruling, while Wabol's petition for rehearing claimed that the Ninth Circuit lacked jurisdiction to issue the decision. On July 9, 1990, the Ninth Circuit issued an amended opinion, but did not act on the petitions for rehearing. App. 31. Almost two years later, on March 16, 1992, the Court issued another amendment to the opinion, changing a portion of footnote 19. App. 30. Over two months later, on May 29, 1992, the Ninth Circuit denied both petitions for rehearing and rejected the suggestions for rehearing *en banc*. App. 70.[5]

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District Court for the NMI of its jurisdiction over cases pending before it on the date of passage of Pub. L. No. 6-25. *Commonwealth v. Kawano*, 917 F.2d 379 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1116 (1991).

[5] Two other related appeals are pending in the Ninth Circuit. *Wabol v. Villacrusis*, Ninth Circuit No. 90-15101, is Philippine Goods' appeal from the NMI Supreme Court's

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REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari should be granted because this case involves questions of exceptional importance. The Ninth Circuit recognized that "the order validating the racially based land restrictions under constitutional equal protection doctrine clearly 'disposed of an unsettled issue of national significance' of critical importance to those inhabiting the territory and to those affected by any questions relating to the application of the Constitution to NMI." App. 9-10; *Wabol v. Villacrusis*, 958 F.2d at 1455.

When the Ninth Circuit resolved that issue in this case, the significance increased. The Ninth Circuit declared that pursuant to the Territorial Clause, the Congress could discriminate in the NMI on the basis of race, as long as the discrimination did not affect a fundamental right "in the international sense." The Ninth Circuit interpreted this category of fundamental rights not to include the right to own property. This broad interpretation of the Territorial clause authorizes Congress to enact racially discriminatory classifications among United States citizens in the commonwealths, possessions and territories of the United States. It allows Congress to delegate to the local governmental entity the enforcement of the racial restriction against political minorities. The Ninth Circuit's decision in this case is in conflict with decisions of the United States Supreme Court.

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assertion of jurisdiction over the appeal. *See* App. 11-12. *Wabol v. Villacrusis*, Ninth Circuit No. 90-15785, is Wabol's appeal from the grant of a stay to Philippine Goods by the Appellate Division of the federal District Court.

ARGUMENT

I

Congress Has No Power To Grant Equal Protection Guarantees To The Commonwealth Of The Northern Mariana Islands In A Racially Discriminatory Manner.

The Ninth Circuit asked the question whether "Congress exceed[ed] its powers under Article IV, section 3 by insulating section 805 from the reach of the equal protection clause?" App. at 21; *Wabol v. Villacrusis*, 958 F.2d at 1459. The Ninth Circuit's conclusion that Congress can do so ignores the fact that this exclusion is racially discriminatory and therefore itself in violation of the Constitution.

Here, Congress granted the full force of the equal protection clause to the NMI under Covenant §501. An exception to this protection is an exclusion that requires race discrimination. The heart of the equal protection clause is protected from racial discrimination. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). If a right is granted by Congress, it must be done in compliance with the Constitution, including compliance with equal protection guarantees, and specifically without racial discrimination. Congress cannot carve out exceptions for itself in granting rights where the exceptions in the grant run afoul of the equal protection clause of the U.S. Constitution. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (fifth amendment's equal protection component restricts Congressional action).

The territorial clause does not sanction this perverse exercise of power.[6] Congress' power to legislate under

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[6] The Territorial Clause provides in part that Congress has the power "to dispose of and make all needful Rules and

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the territorial clause, like every other legislative power, is subject to the constitutional restrictions contained in the Bill of Rights. When Congress acts, it must act consistently with the Constitution. As the Supreme Court observed:

> [t]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.

Williams v. Rhodes, 393 U.S. 23, 29 (1968). *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no act of Congress can authorize a violation of the Constitution."); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (fifth amendment's equal protection component restricts Congressional action).

The Ninth Circuit previously considered whether Congress was required to grant a procedural right to people living in the NMI – the jury trial right in local law

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Regulations respecting the Territory or other property belonging to the United States." But it is questionable whether Congress had the power to legislate with regard to the NMI under the territorial clause because it was not considered a territory or possession at the time that the Covenant was enacted. *See, e.g., Holmes v. Director of Revenue and Taxation*, 827 F.2d 1243, 1245 (9th Cir. 1987) (NMI is not a possession of the United States but a United Nations Trust administered by the United States); *People of Saipan v. United States Department of Interior*, 502 F.2d 90, 95 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (" . . . the Trust Territory is not a territory or possession, because technically the United States is a trustee rather than a sovereign.").

cases. *CNMI v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984).

Contrary to the Ninth's Circuit's analysis, this case is not just an extension of the principles of *Atalig*. In *Atalig* the complaint was that Congress granted no procedural right at all to a jury trial in local law cases. It was not a case where Congress granted a right in a racially discriminatory manner. The Ninth Circuit's conclusion in *Atalig* that the jury trial right in local law cases was non fundamental was made in the context that the *denial* of the non fundamental right was to everyone, of every race, creed, or color, including all United States citizens living in the Northern Marianas. In this case, however, the extent of the *grant* of equal protection rights is determined by the suspect classification of race.

This is not a situation where Congress denies the right to alienate NMI property to everyone in the NMI, of every race, creed, or color. Congress may not be required to grant a right to jury trial, but once granted, it must be done in a race neutral manner, or it must meet the standards imposed by the equal protection clause for race classifications. If Congress has the choice of extending less than the full guarantees of the equal protection clause to the NMI, then any exemptions granted cannot be based on the suspect classification of race. The Ninth Circuit's decision erroneously gives Congress a broad power to extend a wide range of benefits and rights to United States territories and possessions in a race based manner.

II

The Ninth Circuit's Analysis Is Contrary To the Supreme Court's Holding in *Examining Board of Engineers v. Flores de Otero.*

In holding that the racial restriction on the acquisition of property in the NMI was immunized from any

equal protection scrutiny, the court posed the question as: "Is the right of equal access to long term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?" App. at 21.

The court explained that it phrased the question this way because:

> It is thus important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. *It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.*

App. 23 n.19 (emphasis added).

Thus by altering the question, the Ninth Circuit shifted the emphasis from the invidious discrimination to the specific activity sought to be conducted without race discrimination – the purchase of a long term interest in Commonwealth property. The Ninth Circuit's analysis ultimately results in the conclusion that no fundamental right to equal protection is implicated because the right to purchase land in the NMI is not fundamental enough. The question asked ignores the issue of racial discrimination, allowing the court to arrive at the unsettling conclusion that only an activity declared fundamental "in the international sense" is deserving of protection from racial discrimination in an unincorporated territory. App. 22.

Contrary to the Ninth Circuit's analysis, this case is not an extension of the principles of *Insular Cases* doctrine. The *Insular Cases* stand for the proposition that

application of only fundamental rights to unincorporated territories is required, but nonfundamental rights need not apply to these territories. *Downes v. Bidwell,* 182 U.S. 244 (1901); *DeLima v. Bidwell,* 182 U.S. 1 (1901).

In "unincorporated" territories, Congress is constrained only by those "principles which are the basis of all free government which cannot be with impunity transcended." *Downes v. Bidwell,* 182 U.S. at 292; *Dorr v. United States,* 195 U.S. 138 (1904); *Balzac v. Porto Rico,* 258 U.S. 298 (1922).

The question that the court should have asked is "whether the right to be free of invidious classifications based on race, ethnicity or alienage is a fundamental right applicable in the Commonwealth under the *Insular Cases* analysis?" The Supreme Court's opinion in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 600 (1976) already answered this question "yes."

The issue in *Examining Board of Engineers v. Flores de Otero* involved Puerto Rico's enactment of a law allowing only United States citizens to practice privately as engineers. The Supreme Court examined the *Insular Cases* and held that the equal protection of the laws was a fundamental right applicable to the unincorporated territory of Puerto Rico. *Id.* at 600 ("It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.").[7]

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[7] The Supreme Court found it unnecessary to address the question whether it was the fifth or fourteenth amendment that required the result. *Id.* at 601. The equal protection clauses of the fifth and fourteenth amendments are co-extensive. *United States v. Paradise,* 480 U.S. 149, 166 n.16 (1987) (plurality opinion).

Finding the right to equal protection of the laws to be a fundamental right, the Supreme Court examined the law under traditional equal protection analysis and found that it did not, as a classification based on alienage, withstand strict scrutiny.

In contrast, if the United States Supreme Court had used the Ninth Circuit's approach in *Examining Board of Engineers v. Flores de Otero,* the Supreme Court would have asked: "Is the right of equal access to a private civil engineering practice in Puerto Rico, resident in the equal protection clause, a fundamental one?"

No doubt the answer would have been "no" because the question is phrased to remove the offensive nature of the restriction – whether it is a classification based on race or alienage – and place the emphasis instead on the importance of the underlying activity. But the Supreme Court has definitely answered the question whether equal protection is a concept coming within the *Insular* cases definition of a fundamental right. *Examining Board of Engineers v. Flores de Otero,* 426 U.S. at 600 ("The Court recognized the applicability of these guarantees [of the due process and equal protection clauses] as long ago as its decision in *Downes v. Bidwell,* [citation omitted] and *Balzac v. Porto Rico* [citation omitted]."). *See also Ralpho v. Bell,* 569 F.2d 607 (D.C.Cir. 1977) (protections of the due process clause of the fifth amendment apply to the actions of the United States in the Trust Territory of the Pacific Islands).

That conclusion cannot be altered by re-phrasing the question. Equal protection of the laws means more than the right to live free of racial discrimination in certain facets of our existence. The point of the equal protection clause is the value in treating all persons equally despite

their race, creed, or national origin. It applies regardless of the arbitrary value assigned by others to the underlying activity that the individual would like to conduct without discrimination.

Thus there may be no "fundamental right" to eat lunch at a particular lunch counter, but that does not mean that the government may prevent certain classes of people from being served based on race. *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 151-152 (1970). Similarly, there are many rights that are not deemed fundamental, but if granted, both Congress and the States would be required to dispense them without racial discrimination. *Compare, e.g., San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1 (1973) (education not a fundamental right) *with Brown v. Board of Education*, 347 U.S. 483 (1954) (equal protection clause prohibits states from maintaining racially segregated public schools) and *Bolling v. Sharpe*, 347 U.S. 497 (1954) (equal protection clause prohibits Congress from maintaining racially segregated schools in District of Columbia).

The Ninth Circuit's citation of *Califano v. Torres*, 435 U.S. 1 (1978), does not bolster its conclusion. In *Califano*, like *Atalig*, the question was whether Congress could deny social security benefits to *all* persons in Puerto Rico of every race, creed, or color.

A more important distinction is that the right to social security benefits has never been deemed fundamental. In contrast, in addition to the racial basis of the restriction, the right to own property is a basic and fundamental right. *See Shelly v. Kraemer*, 334 U.S. 1, 10 (1948) ("It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire,

enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.")[8]

III.

The Ninth Circuit's "Impractical and Anomalous" Test Creates a Free Zone for Racial Discrimination

The Ninth Circuit decided that affording the right to be free from racial discrimination in the ownership of real property in the NMI would be impractical and anomalous. App. 24; *See King v. Morton*, 520 F.2d 1140 (D.C.Cir. 1975) (using "impractical and anomalous" test in the context of the procedural right to a jury trial in American Samoa.)[9] Thus, it created a vacuum. Restrictions on the

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[8] The United Nations Trusteeship Agreement limits Congress' authority under the Territorial Clause. Contrary to the court's opinion, Philippine Goods did raise the issue of §805's compliance with the Trusteeship Agreement. *See Wabol v. Villacrusis*, 958 F.2d at 1459. Given the question of whether the territorial clause power applied, see *infra* note 6, Philippine Goods argued that the Trusteeship Agreement provided possibly the only source of Congressional power to enact the restriction. Philippine Goods argued that the Trusteeship Agreement did not give Congress authority for the enactment of §805, but rather showed that Congress had no right to enact the restriction because it discriminated among elements of the population. Opening Brief of Philippine Goods, *Wabol v. Villacrusis*, Ninth Circuit No. 87-1736, at pages 19-20 (quoting Article 6 of the Trusteeship Agreement.) *See also id, at* page 25; Reply Brief of Philippine Goods at page 2 n.1, 5, 13-14, 16.

[9] The Ninth Circuit adopted the "impractical and anomalous" test from *King v. Morton, supra*, which derived the test

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alienation of land to persons of Northern Marianas descent do not even have to meet a test of rationality. Once a right – including the fundamental right to own property – is pronounced "impractical and anomalous," Congress may enact racially based exemptions as it chooses, without scrutiny. Even benign race conscious measures enacted by Congress have been subjected to the more rigorous scrutiny that they must "serve important governmental objectives within the power of Congress" and the measures must be "substantially related to the achievement of those objectives." *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547, 110 S.Ct. 2997, 3008-09 (1990), *reh. den.*, 111 L.Ed.2d 829 (1990).

The Ninth Circuit's exemption goes further than endorsement of benign race-conscious programs. It gives Congress the green light to discriminate on the basis of race in the commonwealth, territories, and possessions of the United States without scrutiny.[10]

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from a one-justice concurring opinion in *Reid v. Covert*, 354 US 1, 7t (1957) (Harlan, J., concurring).

[10] The extent of Congressional power to discriminate on racial lines may arise again as unincorporated territories and possessions of the United States negotiate or re-negotiate their status with the United States. Guam, for example, is seeking a commonwealth status with the United States. *See* Guam Draft Commonwealth Act, *reprinted in* 134 Cong. Rec. 3996 (1988).

The Ninth Circuit also noted that "absent the alienation restriction, the political union would not be possible." App. 25. If this were sufficient justification, such a boilerplate recitation in every agreement would be sufficient to waive constitutional guarantees to persons in unincorporated territories. *See Reid v. Covert*, 354 U.S. 1, 14 (1957) ("The concept that the Bill of Rights and other constitutional protections against arbitrary

(Continued on following page)

The result of that rule in this case demonstrates the fallacy of permitting unfettered discretion to discriminate. The Ninth Circuit endorsed the land alienation restriction in terms of the goal of protection of indigenous land rights, and ignored the operation of the actual restriction. An examination of the restriction would show that its goals are ill-served by its actual operation.

Covenant §805 provides that the goals of the racial restriction are to: (1) protect NMI persons from exploitation; (2) promote economic advancement and self-sufficiency; and (3) recognize the importance of ownership of land for the culture and traditions of the people of the NMI.

But even a cursory review of the §805 restriction reveals substantial flaws. Covenant §805 allows persons of Northern Marianas descent to acquire unlimited amounts of property from other persons of Northern Marianas descent without controls placed on their acquisition. No protection is available for persons who are dispossessed when their land is acquired. It will make little difference to the landless that a person of Northern Marianas ancestry made them landless and economically dependent. If this racial restriction is intended to prevent the people of the NMI from losing their lands or being exploited, it incorrectly assumes: (1) there is nothing wrong with persons losing their land to persons who

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government are inoperative when they become inconvenient or when expediency dictates otherwise is a dangerous doctrine and if allowed to flourish would destroy the benefit of a written constitution and undermine the basis of our Government.").

happen to be of the correct NMI ancestry; or (2) there are no persons of NMI descent who would exploit persons of NMI descent. *See* Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards,* 9 Denver Journal of International Law and Policy 35, 61-62 (1980).

Moreover, if the culture of the NMI is truly dependent on the land, it is fanciful to suggest the culture will be disrupted by outright sales, but not by long term leases which remove the land from its owners' use for their lifetimes or longer. The restriction offers no protection from economic exploitation for those persons who enter into leases of 55 years or less.

These long-term leases displace persons of Northern Marianas descent from their land despite any effect on the culture. Article XII allows the loss of lands for 55 years without qualification, and permanently if the purchaser is of Northern Marianas descent. It offers no protection for any culture that is tied to the land, except on the chance that the culture will resurge in 40 or 55 years. In short, the restriction focuses exclusively on a racial target, although the actual problem that it attempts to address involves a number of complex issues and interactions that cross racial lines.

IV.

The Ninth Circuit's Decision Endorses the Enforcement of a Racial Restriction By a Political Majority Against a Political Minority.

The Ninth Circuit's decision allows Congress to delegate enforcement of Covenant §805's racial restriction to

the NMI. The Ninth Circuit used its conclusion that Covenant §805 was valid as a bootstrap to endorse - without review – Article XII of the NMI Constitution. The Ninth Circuit essentially allowed Article XII, as the vehicle for implementing §805, to escape without any meaningful scrutiny. *See* App. 27 ("Accordingly, Congress acted within its power in enacting sections 501(b) and 805 of the Covenant, and Article XII is not subject to equal protection attack.")

Covenant §805, even if accepted as an exemption from the restraints of equal protection review, limits the breadth of Article XII. The fourteenth Amendment of the United States Constitution is fully applicable to the NMI, but for the limited exemption granted by §501(b) of the Covenant, which includes §805. Article XII must be independently evaluated to determine if it fits within the scope of Covenant §805. Moreover, delegation of the enforcement of the restriction to the favored majority calls for heightened scrutiny.

Although acknowledging that Article XII can be a tool for overreaching, the Ninth Circuit relegated Philippine Goods to the NMI political arena for any relief. *See* App. 29 n.23. But Philippine Goods is not only a member of the non-favored racial group for the purposes of Article XII, but also in the political arena. The NMI Legislature is wholly composed of persons of Northern Marianas descent. The three full time justices of the newly created NMI Supreme Court, and the Governor, are persons of Northern Marianas descent. This is a situation where a majority is given the power to enforce a racial classification against a minority. In these circumstances, Article XII should be subject to a more searching review. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989)

(where five of nine city council seats were held by blacks and population was 50% black, " . . . concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against the application of heightened judicial scrutiny" of affirmative action program.)

There is an inherent hazard when persons of the favored classification control implementation of that classification in a small society. *Id.* at 522-23 ("[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States," because of the "heightened danger of oppression from political factions in small, rather than large, political units.") (Scalia, J. concurring).

The Ninth Circuit has itself acknowledged in other cases that the small and family centered structure of NMI society imposes some limitations on the traditional justice system. In upholding the NMI's exemption from the procedural requirement of jury trials in local criminal cases, the Ninth Circuit recently emphasized the importance of the exemption, explaining that the limitation found justification in the "fear that the small, closely-knit population in the Northern Mariana Islands might lead to acquittals of guilty persons in criminal cases." *Commonwealth v. Magofna*, 919 F.2d 103, 106 (9th Cir. 1990) (quoting Comm. On Personal Rights and Natural Resources, Rep. No. 4 (1976)). *See also* Liebowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* (1989) at 526 (the extended family is still the basic social and political block of NMI society).

The fear is more than theoretical. In 1989, the NMI created its own Supreme Court. This new court recently

fashioned a novel "resulting trust" doctrine that voids even fifty-five years leases taken by non-Northern Marianas descent persons. In *Aldan-Pierce v. Mafnas*, No. 89-003, 1991 WL 165048 (NMI Sup.Ct. July 5, 1991)[11] a person of Northern Marianas descent took fee title with funds advanced by persons not of Northern Marianas descent. In turn, she granted them a 55 year leasehold interest in the land, the maximum permitted under NMI law. Although 55 years leases are valid under Article XII, the NMI Supreme Court created a fictional title in the non-Northern Marianas descent persons. This title, the NMI Supreme Court found, was involuntarily owned in a "resulting trust" by the person or persons who advanced funds, in whole or in part, that the person of

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[11] *Aldan-Pierce v. Mafnas* is now on appeal to the Ninth Circuit Court of Appeals pursuant to Covenant §403(a). *Aldan-Pierce v. Mafnas*, Ninth Circuit No. 91-16240 (appeal filed July 30, 1991).

Mafnas, the original land owner challenging the land transaction, had lost his case in the Commonwealth Trial Court, as well as his appeal in the appellate division of the federal district court for the NMI. He appealed to the Ninth Circuit, but after passage of the NMI Judicial Reorganization Act, chose to dismiss the Ninth Circuit appeal, and pursue the appeal in the NMI Supreme Court. Because the *Aldan-Pierce* appeal was pending in the Ninth Circuit at the time that the NMI Judicial Reorganization Act was passed, the NMI Supreme Court attempted to "pull back" the appeal to its court from the Ninth Circuit. NMI Pub.L. No. 6-25 §3109. The Ninth Circuit, however, held that the NMI legislature had no authority to "pull back" appeals pending in the Ninth Circuit. App. 16-17; *Wabol v. Villacrusis*, 958 F.2d at 1457-58. The *Aldan-Pierce v. Mafnas* case is now on appeal from the decision of the NMI Supreme Court and the NMI Supreme Court's jurisdiction is the threshold issue.

Northern Marianas descent used to buy the land. The resulting trust arises despite express agreements and title documents to the contrary.

Article XII's design deliberately reflected a bright-line test. *Briefing Papers for the Delegates to the Northern Mariana Constitutional Convention: Briefing Paper No. 12,* Restrictions on Land Alienation 48 (1976). The bottom line of the NMI Supreme Court's new doctrine, however, is to turn the bright-line test of Article XII into a murky Gestalt test administered by the NMI judiciary on a case by case basis. Record land title has no value in the NMI because it is the unrecorded relationships of the parties that must be examined under the NMI Supreme Court's new test. Having erased the bright-line test, discretion in application of the new test to administered by the favored group against the non favored group.

In a subsequent case, a "special Judge," not a full time justice of the NMI Supreme Court criticized the NMI Supreme Court's opinion in *Aldan-Pierce v. Mafnas.* In a opinion dissenting from the NMI Supreme Court's application of its test in another case involving Article XII, Special Judge King stated that the court was voiding agreements that did not violate the plain terms of Article XII. He noted the NMI Supreme Court's use of Article XII as a tool to manipulate cases to reach a result that the NMI Supreme Court wanted to reach, rather than one warranted by the language of Article XII:

> Moreover, nothing in the [NMI] Constitution or the constitutional history suggests that this Court is designated to ferret out and punish attempts by non-NMDs and NMDs to enter into transactions which we may perceive somehow as contrary to the spirit of article XII even

> though not actually prohibited by the language of the article.
>
> Specifically, nothing in these sources of law hints of a constitutional directive that we should expand or modify other concepts, such as the resulting trust doctrine, and superimpose these altered doctrines over the article XII restrictions in order to outlaw arrangements which are not directly prohibited by article XII but which we believe should have been prohibited.[12]

Ferreira v. Borja, No. 90-047, 1992 WL 62894 (NMI Sup.Ct. Feb. 18, 1992).

But as important as the actual test adopted by the NMI Supreme Court in *Aldan-Pierce v. Mafnas* is the process that went into forming it. The mother-in-law and father-in-law of one of the Justices sitting on the NMI Supreme Court in the *Aldan-Pierce v. Mafnas* case filed lawsuits challenging apparently similar transactions, including one in which a $100 million dollar hotel had been built on the property during the seven year period since the mother-in-law's transaction. In these cases, the in-laws sought return of their land, with no obligation to

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[12] His criticism included that the NMI Supreme Court's use of the resulting trust doctrine in this context "rips the resulting trust doctrine from its moorings," "is inherently suspect," and "is a perverse misapplication of the doctrine." *Ferreira v. Borja*, NMI Supreme Court No. 90-047, at 19 and 20 (King, J., dissenting). Moreover, he noted that "this novel effort has forced the Court to ignore or modify key aspects of the doctrine, and thereby to transmogrify the resulting trust doctrine itself." *Id.* at 19. He pointed out that the court had committed "errors of logic and analysis, including circular reasoning and unjustified adoption of legal fictions . . . " *Id.* at 23.

refund the purchase price or pay for the improvements on the land. *See Dela-Cruz v. Hotel Nikko Saipan, Inc. et al,* Commonwealth Superior Court, Civil Action 91-259, filed March 26, 1991; *Francisco Chong v. Kamoshita Marianas Ent. Inc.*, Commonwealth Superior Court, Civil Action 91-264, filed March 28, 1991. The lawsuit was filed on their behalf after *Aldan-Pierce v. Mafnas* has been submitted to the NMI Supreme Court, but before issuance of the decision. Aldan-Pierce filed a motion to disqualify Justice Villagomez, but he claimed that his disqualification was not required until all the facts of his in-laws' cases had been litigated. Order dated June 20, 1991, *Aldan-Pierce v. Mafnas,* NMI Supreme Court No. 89-003. This is contrary to the rule announced by the Supreme Court in *Aetna Life Insurance v. LaVoie,* 475 U.S. 813, 835, 106 S.Ct. 1580, 1587 (1986) (due process clause mandates that judge be disqualified in a case in which an average judge might be tempted "not to hold the balance nice, clear and true").

Justice Villagomez participated in the *Aldan-Pierce v. Mafnas* decision. On the same day as the issuance of the decision in *Aldan-Pierce v. Mafnas,* which significantly enhanced the likelihood of the success of his in-laws' lawsuits, and settlement value, the Justice disqualified himself from several other cases involving Article XII "because his mother-in-law and father-in-law have filed cases involving Article XII of the NMI Constitution." *Wilfred S. Reyes v. William H. Millard, et al.*, NMI Supreme Court Appeal No. 90-058, Order dated July 5, 1991; *Vincent S. Cepeda v. Robert A. Hefner et al.*, NMI Supreme Court Appeal No. 90-057, Order dated July 5, 1991. The die had been cast, however, and application of the precedent now affects other litigants' cases.

The point that the Ninth Circuit overlooked is that the NMI should not be able to insulate their actions from scrutiny simply by proclaiming that they undertook them in the name of §805. Thus, assuming §805 is not unconstitutional, the NMI's implementation of §805 should be subjected to some scrutiny to determine whether it fits within §805's exemption window. Moreover, the scrutiny should be rigorous, given the NMI is enforcing the racial restriction against a political minority.

The Ninth Circuit ignored these issues. Yet, several actions of the NMI call into question Article XII's fit within the exemption window of §805. For example, the NMI has implemented Section 805's goals through a floating "long term interest" rate. In 1978, a "long term interest" in land was defined as a leasehold over 40 years, and deemed to be in contravention of §805's goals. In 1985, a "long term interest" was re-defined by the NMI as a leasehold longer than 55 years, and only then in contravention of §805's goals. The result is the same lease at issue here, if entered into in 1986, rather than 1978, would be held valid under Article XII and deemed in compliance with §805's goals. As a fifty year leasehold, it would have been deemed to fit well within the goals of §805. But the NMI's amendment re-defining "long term interests in land" for the purposes of §805 was not retroactive. *See* Article XII, §3, as amended. As a result, Philippine Goods and its sublessee Transamerica will lose their business on their leased land.

Finally, Covenant §805 does not endorse, mention, or authorize a "void ab initio" penalty. But Article XII, as implemented by the NMI flatly and without qualification,

voids all transactions that do not meet the standards of Article XII, as those standards are defined by the NMI, no matter what the fault, impact, nature of the deviation, or other circumstances. Leases are voided that are no different from leases signed a few years later that are now deemed consistent with §805's goals.

V.

The Ninth Circuit Misapplied Its Own Test In Finding that the Right to Own Property Without Racial Discrimination In the NMI Would be "Impractical and Anomalous."

Although labeling the right to own land free of racial restrictions "impractical and anomalous" in view of the "local culture and values" of the NMI, the Ninth Circuit did not examine the contemporary culture and values of the NMI, nor did it question adherence to the underlying principles of §805 in other facets of NMI government policies. In contrast, in *King v. Morton,* from which the "impractical and anomalous test" was adopted, the court said that the question could only be answered by considering "solid evidence of actual and existing conditions" and remanded to allow such a factual record to be developed. *King v. Morton,* 520 F.2d at 1148.

In this case, the Ninth Circuit – after announcing adoption of the test – relied upon information about the NMI in the 1970's, without any examination of whether those conditions still exist. Current conditions in the NMI demonstrate the fallacy of a simplistic racial solution to a complex problem. Economic development in the NMI boomed during the 1980's, with hotel development and tourist arrivals dramatically increasing, all with the approval and support of the NMI government. CNMI

Office of Planning & Budget, *Economic Development Strategy*, 46-60 (1990) ("Economic Development Strategy"). Tinian, one of the smaller islands in the NMI, voted to allow casino gambling, and the establishment of five casino gambling resorts are now authorized. Tinian Local Initiative 1 (1989). The NMI also developed a garment industry, and over 20 plants now operate there. *Economic Development Strategy, supra* at 61.

The NMI also controls its own immigration under the Covenant. Covenant §503. The number of resident alien workers has grown tenfold in the last ten years, as alien workers from surrounding Asian countries legally enter and come to work in the NMI. U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing, Commonwealth of the Northern Mariana Islands (March, 1992) at 18. In fact, the 1990 Census shows that the NMI population has more than doubled since 1980, and politically disenfranchised alien workers now compose at least 52% of the NMI's total population of 43,345. *Id.* at 16.

With hotel and resort development, casino gambling, and garment factories, it is now difficult to make a case that allowing the free alienation of land – as opposed to 55 year leaseholds – will disrupt the culture and traditions of the NMI. For better or for worse, during the last 12 years, the NMI itself has opted to enter the global economy.

CONCLUSION

The issues raised in this case call into question the powers of Congress to enact racial classifications affecting the ownership of property in the commonwealths,

possessions, and territories under the sovereignty of the United States. The issues are of importance to the people living there because the Ninth Circuit has endorsed Congressional authority to discriminate among them based on race. The issues are of importance to the people of the United States generally because the Ninth Circuit has limited the safeguards of the equal protection clause.

Petitioners pray that the Court grant certiorari for review of this case.

Dated this 4th day of August, 1992.

Respectfully Submitted,

MARYBETH HERALD
BERGSMA & HERALD

JOE HILL
HILL & SAWHNEY

Attorneys for Petitioners

Concepcion S. Wabol, et al.,
Plaintiffs-Appellees

v.

Victorino Villacrusis, et al.,
Defendants-Appellants.

Ninth Circuit No. 87-1736

United States Court of Appeals
for the Ninth Circuit

Argued and Submitted,
San Francisco, California
May 11, 1988

Second Amended Opinion Filed March 16, 1992

JUDGES: Before: Cecil F. Poole, Charles Wiggins and Melvin Brunetti, Circuit Judges.

AMENDED OPINION

POOLE, Circuit Judge:

In *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244, 82 L. Ed. 2d 826, 104 S. Ct. 3518 (1984), we held that the Sixth Amendment right to a trial by jury does not apply in the Commonwealth of the Northern Mariana Islands (NMI or Commonwealth). This case requires us to determine whether the constitutional guarantee of equal protection of the laws limits the ability of the United States and the Commonwealth to impose race-based restrictions on the acquisition of permanent and long term interests in Commonwealth land. Plaintiffs-appellees Concepcion S. and Elias S. Wabol (collectively Wabol) brought this action in the Commonwealth Trial Court to void their lease agreement with defendants-appellants Victorino Vilacrusis and Philippine Goods, Inc. (collectively PGI). Wabol alleged

the agreement violated Article XII of the NMI Constitution which provides that the sale of a freehold or a leasehold exceeding forty years, including renewal rights, to a person not of Northern Mariana Islands descent, is void ab initio. PGI defended on the ground that Article XII violates the equal protection clause of the United States Constitution. The trial court upheld the restriction but reformed the lease on equitable grounds. The Appellate division of the District Court for the Northern Mariana Islands reversed, also upholding the restriction, but concluding that section 6 of Article XII precludes reformation of a prohibited lease. The district court remanded to the trial court "to determine the terms and conditions of any obligations which may have arisen in quasi contract or as a result of a periodic tenancy" and to account for the improvements erected on the land by PGI. PGI timely appealed.

We conclude that, despite the remand, we have jurisdiction to consider this appeal. In addition, we conclude that the Commonwealth Judicial Reorganization Act of 1989, NMI Public Law No. 6-25, enacted while this appeal was pending, does not divest this court of jurisdiction to decide the appeal. On the merits, we hold that the right to acquire permanent or long-term interests in NMI real estate is not one protected by the United States Constitution. We further hold that Article XII precludes reformation of a lease which violates its provisions. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

A. Facts

In 1978, defendant Filomenia Wabol Muna and PGI entered into an agreement, approved by Wabol, to lease a

parcel of NMI property for a 30 year term with an unconditional option in lessee PGI to renew for 20 additional years. Thereafter Wabol obtained full ownership of the premises in a partition action. Muna, however, continued to collect rents, and Wabol brought this suit seeking, *inter alia*, a judgment voiding the lease for violation of Article XII.

B. Article XII of the NMI Constitution and the Covenant

Article XII of the NMI Constitution implements section 805 of the Covenant to Establish a Commonwealth in Political Union With the United States of America, *reprinted as amended* in 48 U.S.C.A. §1681 note (West 1987) (Covenant). Section 805 provides that, notwithstanding federal law, the Commonwealth government shall regulate the alienation of local land to restrict the acquisition of long-term interests to persons of Northern Mariana Islands descent.[1] The avowed motive of the drafters was

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[1] Covenant section 805 provides:

> Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency:
>
> (a) will until twenty-five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long-

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"to protect [the people] against exploitation and to promote their economic advancement and self-sufficiency" and to preserve the islanders' culture and traditions, which are uniquely tied to the land. Accordingly, Article XII, section I provides that

> [t]he acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 3 of that Article defines the restricted interests:

> The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.[2]

Section 4 defines a person of Northern Marianas descent as one

> who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Mariana Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas decent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be

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term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and

(b) may regulate the extent to which a person may own or hold land which is now public land.

[2] This section was amended in 1985 to define a long-term leasehold as one of more than fifty-five years. The amendment is nonretroactive.

> considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.[3]

Sections 6 of Article XII provides in pertinent part that "any transaction made in violation of Section 1 shall be void ab initio."

C. Proceedings below

On Wabol's motion for summary judgment, the trial court ruled that: (1) the lease violated Article XII, section 1; (2) Article XII did not violate the equal protection clause; but (3) in light of Wabol's "waiver, laches and estoppel" in allowing PGI to pay rent for almost seven years and construct extensive improvements on the property, the lease was valid for the forty year allowable term. In its equal protection analysis, the court applied a

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[3] Section 5 defines corporate persons eligible to purchase permanent and long-term interests:

> A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by Section 4.

Section 5 was amended in 1985 to raise the fifty-one percent provisions to one-hundred percent, and in other particulars not relevant here. It is undisputed that PGI is an ineligible corporation.

relaxed rational basis standard of review, drawing an analogy to decisions dealing with classifications favoring American Indians. The parties stipulated to judgment and appealed. The appellate division of the district court agreed that the lease was invalid, also applying minimal equal protection scrutiny. However, the district court rejected the trial court's implicit conclusion that section 6 permitted reformation of a nonconforming lease, and reversed. The case was remanded to the trial court for a determination of (1) the value of the improvements and (2) the extent of any rights arising in quasi contract or as the result of a periodic tenancy. This appeal timely followed.

II. JURISDICTION

Preliminarily, we must determine whether the district court's remand order deprives us of jurisdiction over this appeal.[4] In addition, we must determine whether NMI Public Law 6-25 divests this court of jurisdiction over the appeal. We determine our jurisdiction *de novo*. *Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

A. Finality of the Remand Order

It is axiomatic that our jurisdiction extends only to "final" judgments of the district court. However, we measure the finality of decisions of the appellate divisions of the district courts for Guam and the Commonwealth by analogy to the standard the Supreme Court applies in reviewing state court judgments under 28 U.S.C. §1257.

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[4] A motions panel ordered PGI to show cause why the appeal should not be dismissed for want of a final judgment. PGI responded and the matter was referred to this panel for determination preliminary to the merits.

See Guam v. Kingsbury, 649 F.2d 740, 742 (9th Cir. 1980), *cert. denied*, 454 U.S. 895, 70 L. Ed. 2d 210, 102 S. Ct. 392 (1981).

Clearly, the decision at hand is "not final in the strict sense of a decree that leaves nothing further to be addressed by the [local] courts." *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277, 64 L. Ed. 2d 284, 100 S. Ct. 1673 (1980). However, the Supreme Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), described four categories of judgments with "sufficient characteristics of finality to warrant an assertion of . . . appellate jurisdiction." *Alvez*, 446 U.S. at 277. *See Cox Broadcasting*, 420 U.S. at 477-87. We recently summarized the exceptions:

> The [Supreme] Court will review federal issues in state court cases even though further proceedings are pending when: (1) the federal issue is conclusive or the outcome is preordained; (2) the federal issue will survive the further proceedings and require adjudication; (3) the federal issue has been fully decided and review after remand might be precluded; (4) the federal issue has been fully decided and the case might be decided on nonfederal grounds below, but determination of the federal issue would immediately resolve the case and delaying review would erode federal policy.

Kiaaina v. Jackson, 851 F.2d 287, 289 (9th Cir. 1988) (per curiam) (*citing Cox Broadcasting*, 420 U.S. at 479-83).

In applying the exceptions, we have frequently observed that the analogy is imprecise. *See Kiaaian, Id.; Guam v. Manibusan*, 729 F.2d 1236, 1238 (9th Cir. 1984); *Guam v. Quinata*, 704 F.2d 1085, 1086 (9th Cir. 1983); *see*

also Kingsbury, 649 F.2d at 746-48 (Poole, J., dissenting). *Cox Broadcasting* accommodates the competing concerns of judicial efficiency, federalism and comity presented by Congress' grant of power under section 1257 to review questions of federal law decided by state courts. *Kiaaina*, 851 F.2d at 289. But these concerns are vastly different in the present context because our jurisdiction under 48 U.S.C. §1694b(c) is plenary, extending to questions of local as well as federal law, and mandatory.[5] Accordingly, in *Kiaaina* we adjusted the exceptions to more accurately reflect the posture in which we receive cases under section 1694b(c). Thus "[f]or purposes of the Cox analysis . . . all issues are federal." *Id.*

Kiaaina further observed that, under this tightened analogy, "the first two *Cox* exceptions have little relevance in determining the finality of decisions of the Guam Appellate Division." *Id.* It is the second *Cox* exception – cases in which the federal issue "will survive and require decision regardless of the outcome of future state court proceedings," *Cox Broadcasting*, 420 U.S. at 480 – upon which PGI principally relies here.

Despite *Kiaaina's* observation that this exception has "little relevance" to our finality analysis, that court recognized the need to "review decisions from the Appellate Division of the district court of Guam [or, analogously,

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[5] Thus, judicial efficiency, the primary rationale behind the final judgment rule, takes on added dimension. The pendency of *any* question remaining for decision presents the spectre of piecemeal review. And federalism and comity considerations are less relevant where, as here, both Congress and the Commonwealth have assigned federal courts a substantial role in developing Commonwealth law.

the Appellate Division of the district court of the Northern Mariana Islands] when further proceedings are pending . . . if policy issues involved are of such importance as to demand immediate review, or declining to entertain the appeal would preclude further review." 851 F.2d at 290. As the court itself recognized, this test "parallels the 'practical finality' test applied by the Supreme Court in determining its appellate jurisdiction over federal cases." *Id.* at 290 n.5 (*citing Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 13 L. Ed. 2d 199, 85 S. Ct. 308 (1964)).

The 'practical finality' test is satisfied when the following four factors are met: "(1) the case was a ' marginally final order,' (2) 'disposed of an unsettled issue of national significance,' (3) review 'implemented the same policy Congress sought to promote in §1292(b),' and (4) the finality issue was not presented to the Supreme Court until argument on the merits, thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue." *In re Subpoena Served on Cal. Public Utilities Comm'n*, 813 F.2d 1473, 1480 (9th Cir. 1987) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978)).

We believe this case possesses sufficient characteristics of finality under this test to command our immediate attention. The challenged order is 'marginally final' because the pending proceedings have little substance and will not affect the potentially dispositive and obviously central issue – the validity under the federal constitution of the land alienation restrictions set forth in the Commonwealth constitution. Moreover, the order validating the racially based land restrictions under constitutional equal protection doctrine clearly "disposed of an unsettled issue of national significance" of critical importance to those inhabiting the territory and to those

affected by any questions relating to the application of the constitution to NMI. Review of the merits in this case is consistent with the policies underlying §1292(b) in that immediate review is fundamental to the further conduct of the case. *See Gillespie,* 379 U.S. at 154. If we find the restriction invalid, then the remand becomes unnecessary. If we uphold the restriction, there is little more than an accounting remaining for adjudication. Though the remaining issues could eventually ascend to this court, this alone should not prevent our adjudication of important and potentially dispositive questions which have been fully briefed and argued.[6] Such a result would disserve the cause of judicial economy and therefore frustrate the very purpose of the final judgment rule.[7]

Moreover, the Supreme Court, in accepting review of analogous appeals, has often pointed to the divisibility of the issue presented from the issues withheld. *See First English Evan. Luth. Ch. v. Los Angeles Cty,* 482 U.S. 304, 309-10 n.3, 107 S.Ct. 2378, 2383 n.3, 96 L.Ed.2d 250 (1987) (whether county had taken petitioner's property, requiring just compensation, was distinct from the question whether flood control district was liable for damage to that property); *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 907 n.42, 73 L. Ed. 2d 1215, 102 S. Ct. 3409, 3422 n.42 (1982) (pending recomputation of damages distinct from the federal liability issue); *Alvez,* 446 U.S. at 279 (existence of right of consortium under general maritime law

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[6] It is entirely possible that, if this court upholds the challenged restrictions, the issues of local law remaining would never be reviewable by this court. *See* NMI Public Law No. 6-25 and discussion at II.B, *infra.*

[7] Significantly, our exercise of jurisdiction will not interfere with the course of the trial. The trial court purported to issue a final judgment. *See Quinata,* 704 F.2d at 1087.

unaffected by pending questions of negligence and unseaworthiness); *Brady v. Maryland*, 373 U.S. 83, 85 n.1, 10 L. Ed. 2d 215, 83 S. Ct. 1194, 1195 n.1 (1963) (judgment sufficiently final because the question raised was " 'independent of, and unaffected by' what may transpire" on remand) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945)). Because the questions pending for initial decision are insubstantial and cannot affect the questions presented for review, we hold that the judgment is sufficiently final under *Kiaaina* to permit our review.

B. Effect of Public Law No. 6-25

On May 2, 1989, almost one year after this appeal had been fully briefed, argued and submitted for disposition, the Commonwealth legislature enacted the Commonwealth Judicial Reorganization Act of 1989, Public Law No. 6-25, Section 3109 (the "Act"). The Act establishes a local appellate court, the NMI Supreme Court, and purports to divest all federal courts of jurisdiction over appeals, including those pending when the Act was passed, which involve cases originating in the local trial courts. NMI P.L. No. 6-25, §3109(b). The newly established NMI Supreme Court has recently upheld the provisions divesting this court of jurisdiction over this appeal. *See Wabol v. Villacrusis*, No. 89-005 (Sup.Ct. NMI, Dec. 11, 1989). If we decide that the Act does not operate to divest this court of jurisdiction over this appeal or, conversely, to vest such jurisdiction in the NMI Supreme Court, we need not give full faith and credit to the NMI court's judgment. *See Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n*, 455 U.S. 691, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982); *Nevada v. Hall*, 440 U.S. 410, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979), *reh. den.*, 441 U.S. 917 (holding that no full faith and credit is

warranted for decision rendered by court without jurisdiction). We must therefore independently determine whether the Act operates to divest this court of jurisdiction over this appeal.[8] We hold that it does not.

The Covenant, as implemented by Public Law No. 95-157, 91 Stat. 1266 (Nov. 8, 1977), established a district court for the District of NMI, which maintains original federal jurisdiction over cases involving federal questions, diversity, or bankruptcy. 48 U.S.C. §1694a(a). The district court was further authorized to exercise original jurisdiction over cases involving issues of local law which NMI courts were not empowered by the NMI constitution or laws to decide. 48 U.S.C. §1694a(b). In this latter capacity only, the district court is considered to be a local NMI court. *Id.* Otherwise, it is a federal court. 48 U.S.C. §1694c(b).

The Covenant further provides that, until NMI established its own appellate court, the NMI legislature could authorize the district court to have appellate jurisdiction over cases from the NMI trial courts, providing that, at a minimum, the district court would have appellate jurisdiction over such cases when federal issues were involved. 48 U.S.C. §1694b(a).[9] Until the Act was passed

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[8] In any event, if the NMI Supreme Court's jurisdictional decision in *Wabol* were to be given full faith and credit, this court would have appellate jurisdiction under section 403(a) of the Covenant (48 U.S.C. §1694c(a)) to reconsider the NMI court's holding, which directly pertains to an issue of federal law (the validity of the Act's provisions under the Covenant). *See, infra*, note 10.

[9] As originally enacted in 91 Stat. 1266, §1694b(a) authorized the NMI legislature to grant appellate jurisdiction to the district court. This court, in *Sablan v. Santos*, 634 F.2d 1153 (9th Cir. 1980), interpreted this section to allow NMI to determine

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in May, 1989, NMI had no appellate court of its own, and all appeals from the local trial courts, including this one, were heard by the Appellate Division of the district court. *See* NMI P.L. No. 1-5 (1978); *Gioda v. Saipan Stevedoring Co., Inc.*, 855 F.2d 625 (9th Cir. 1988). This court has jurisdiction over all appeals from the appellate division pursuant to section 403(b) of the Covenant, originally codified at 48 U.S.C. §1694c(b), which provides that those sections of Title 28 of the U.S. Code applicable to Guam shall be applied to NMI. 28 U.S.C. §1291 provides for Ninth Circuit jurisdiction over all appeals from the appellate division of the district court of Guam. Congress explicitly clarified section 403(b) by amending the implementing legislation in 1984 to provide that this court "shall have jurisdiction of appeals from all final decisions of the appellate division of the district court" of NMI. 48 U.S.C. §1694b(c).

The Act established a local appellate court, revoking entirely the appellate jurisdiction of the district court. NMI P.L. No. 6-25, § 1. The Covenant clearly entitles the NMI legislature to determine which court(s) will hear direct appeals from its local trial courts. 48 U.S.C. § 1694b(a); *Gioda*, 855 F.2d at 628. The Covenant does, however, limit NMI's authority to restrict the jurisdiction

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the appellate jurisdiction of the district court over all cases involving issues of local law, including those originating in the district court. In 1984, the U.S. Congress clarified §1694b(a) with an amendment permitting NMI to determine only the appellate jurisdiction of the district court over cases in the local trial courts so that NMI could not determine the courts to which cases in the federal district court could be appealed. *See* Public Law No. 98-454, 98 Stat. 1744 (Oct. 5, 1984); *Gioda v. Saipan Stevedoring Co. Inc.*, 855 F.2d 625, 628 (9th Cir. 1988).

of courts empowered to hear appeals from federal courts or involving issues of federal law.[10]

The Act expressly states that all federal courts, including this court and the United States Supreme Court, are divested of jurisdiction over all appeals from cases originating in the local trial courts that were pending when the Act was passed.[11] NMI P.L. No. 6-25, §3109(b). The Act requires that all such appeals shall be heard exclusively by the new NMI Supreme Court. *Id.* Since this appeal was still "pending" in this court for the purposes of the Act, these provisions would clearly apply to divest this court of jurisdiction over this appeal unless the NMI legislature exceeded its authority and the provisions are invalid.

The NMI legislature's authority to establish a local appellate court is governed by section 402 of the

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[10] Section 403(a) of the Covenant, codified at 48 U.S.C. §1694c(a), mandates that, for 15 years after the establishment of a local appellate court, this court would maintain jurisdiction over appeals from such court involving federal law unless such cases are reviewable in the district court appellate division. We hold this section to be inapplicable to appeals, such as this one, which were taken from the appellate division of the district court, and not from the local appellate court newly established by the Act. *See Camacho v. Civil Service Commission*, 666 F.2d 1257, 1261 (9th Cir. 1982). We therefore find it unnecessary at this time to rule on the validity of the Act's attempt to measure the 15 year period from the passage of NMI P.L. No. 1-5, which implemented the Covenant section relating to the appellate jurisdiction of the district court, rather than from the passage of the 1989 Act, which first established a local appellate court.

[11] The Act defines 'pending' appeals as those appeals for which the final mandate of the court hearing them has not issued.

Covenant, which was ratified by the U.S. Congress and codified at 48 U.S.C. §1694b(a). Although section 402 clearly authorizes the NMI to bestow or withdraw appellate jurisdiction on or from the district court in cases originating in the local trial courts, nothing in that section or elsewhere in the Covenant authorizes the NMI to define or limit the jurisdiction of this court or the U.S. Supreme Court. Despite appellees' assertion that "when the root is cut, the branches fall", *Smallwood v. Gallardo*, 275 U.S. 56, 61, 72 L. Ed. 152, 48 S. Ct. 23 (1927), authority over the appellate jurisdiction of the district court does not imply authority over this court. The cases relied on by appellees support only the principle that, once jurisdiction is withdrawn from a lower court, a *subsequent* appeal to a higher court will not save it from that withdrawal. Here, however, the appeal was pending in this court when the Act was passed, and had been properly taken from the appellate division before that court was divested of jurisdiction. Furthermore, when Congress amended the implementing legislation in 1984 to clarify this court's misinterpretation of section 402(c) of the Covenant in *Sablan v. Santos*, it made clear its original intent that NMI would not have the authority to determine which courts would be empowered to hear appeals from federal courts. *See Gioda*, 855 F.2d at 628; 130 Cong. Rec. at S23792 (Sept. 14, 1984) (Senator Weicker explained that section 402(c) of the Covenant, allowing NMI to define the appellate jurisdiction of the district court, means only "that the laws of the Northern Mariana Islands may restrict the right of appeal [from local trial courts], not that a local legislature can determine the court to which the decisions of a federal court may be appealed."). Moreover, nothing in the Covenant can be construed to grant authority to NMI to amend or circumvent the express provision that all appeals from the appellate division of

the district court must be heard by this court, without limitation.[12] 48 U.S.C. §1694b(c).

The Act's attempt to divest this court of jurisdiction over an appeal properly taken from the appellate division of the district court is an exercise of precisely the kind of authority Congress has withheld from NMI and is in direct contradiction with section 1694b(c). Although NMI may clearly determine whether a federal court or a newly established appellate court may entertain appeals from a local trial court, Congress has expressly established that NMI is not authorized to make such determinations

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[12] Although §1694b(c) was enacted subsequent to the Covenant as part of the 1984 amendments, it is entirely consistent with, and appears to be a clarification of, section 403(b) of the original Covenant, codified at 48 U.S.C. §1694c(b), which provides that those sections of Title 28 of the U.S. Code applicable to Guam shall be applied to NMI. 28 U.S.C. §1291, providing for Ninth Circuit review of judgments of the appellate division of the district court of Guam thus applies to judgments of the appellate division of the district court for the NMI. *Camacho*, 666 F.2d at 1260; *Atalig*, 723 F.2d 686 at 686-87. This interpretation in *Camacho* was affirmed by Congress in the 1984 amendments, which were enacted in part to clarify the questions raised by *Sablan*, including questions relating to the jurisdiction of this court over appellate division judgments involving solely local issues. *See* 130 Cong. Rec. at S23792 (Sept. 14, 1984). *Atalig* does not provide support for NMI's attempt to define and limit this court's jurisdiction. This court held in *Atalig* that, because section 403(b) of the Covenant, implemented at §1694b(c), bestowed jurisdiction on this court over appeals from the appellate division of the district court, NMI could authorize its government to appeal from criminal cases in the appellate division. Thus, this court relied solely on the jurisdiction granted to it under the Covenant, and has never authorized NMI to unilaterally define its jurisdiction.

relating to appeals from a federal court.[13] The Act, by establishing a local Supreme Court, does not alter the federal nature of the appellate division of the district court. *See Camacho v. Civil Service Commission,* 666 F.2d 1257, 1261 (9th Cir. 1982) (the appellate division "does not become transmuted into a court of the NMI merely because the NMI granted the court some discretion it could have withheld.").

Therefore, although the Act by its terms applies retroactively to appeals from local trial courts which were pending in the appellate division of the district court when it was passed (*see Gioda,* 855 F.2d at 627), NMI is without power under the Covenant to divest this court of jurisdiction over appeals properly filed from a final order of the appellate division of the district court entered before the passage of the Act.

Since this appeal challenges a final order entered by the appellate division of the district court before May 2, 1989, the Act is without authority to divest this court of jurisdiction over the appeal.

III. MERITS

PGI seeks to avoid the cancellation of its lease by (1) attacking the validity of the constitutional restriction on equal protection grounds, and (2) attacking the district

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[13] In signing the Act into law, the NMI governor himself expressed concern that the legislature had exceeded its power in seeking to divest this court and the United States Supreme Court of jurisdiction over pending appeals. Letter of May 2, 1989 from Governor Tenorio to Senate President Manglona and House Speaker Guerrero, accompanying the signed Act (finding that "the attempt to transfer jurisdiction of cases which are currently before the Ninth Circuit and U.S. Supreme Court is questionable").

court's conclusion that Article XII, section 6 of the NMI Constitution prohibits the reformation of a lease violating section 1 of that Article.

A. Validity of the land alienation restrictions

We review constitutional questions de novo. *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 n.2 (9th Cir. 1985).

A proper understanding of the problem, and our resolution, requires a brief digression into the relationship between the Commonwealth and the United States. Prior to 1947, the NMI endured years of foreign occupation and, eventually, experienced substantial devastation as a battleground in World War II. In 1947, pursuant to a Trusteeship Agreement with the United Nations, the United States became Administrator of the Trust Territory of the Pacific Islands, including NMI, with full powers of administration, legislation and jurisdiction. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 3, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (*Trusteeship Agreement*); *See Atalig*, 723 F.2d at 684. The administration of the Trust Territory was subject to United Nations supervision and circumscribed by the United Nations Charter and the terms of the Trusteeship Agreement. *See generally Gale v. Andrus*, 207 App. D.C. 76, 643 F.2d 826, 830 (D.C. Cir. 1980). The United States was not a sovereign over, but a trustee for the Trust Territory. *See Ngiraingas v. Sanchez*, 849 F.2d 372, 375 n.1 (9th Cir. 1988); *People of Saipan v. United States Dept of Interior*, 502 F.2d 90, 96-97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 43 L. Ed. 2d 761, 95 S. Ct. 1445 (1975). Briefly stated, the Trusteeship Agreement directed the United States to promote the inhabitants' independence and self-government, to protect them "against the loss of their lands" and resources, and to "protect the rights and fundamental

freedoms of all elements of the population without discrimination." Trusteeship Agreement art. 6, §§2, 3. Accordingly, the United States set up local government and negotiated with representatives of the inhabitants to establish a permanent political status. Much of the Trust Territory opted for a status of "free association;" because NMI expressed different aspirations, the United States began separate negotiations with the Marianas Political Status Commission for the people of the Northern Mariana Islands in 1972. That effort culminated in the 1975 execution of the Covenant. The Covenant was subsequently approved by the district legislature, a plebiscite of the people, and the United States Congress, and became law in March 1976. Act of Mar. 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note. *See Atalig*, 723 F.2d at 685; Willens & Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373, 1381-83 (1977). The Covenant defines the relationship between the Commonwealth and the United States, sets up a framework and set of mandates for the Commonwealth Constitution, and provides for the eventual termination of the trusteeship. It provides that, upon termination of the Trusteeship Agreement, the local citizens may become citizens of the United States and the NMI becomes politically united with and "under the sovereignty of the United States of America."[14] Covenant §§301, 101.

Pursuant to section 201 of the Covenant, the Commonwealth held a convention and drafted a constitution

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[14] The Trusteeship was terminated on November 3, 1986. Proclamation No. 5564, 51 FR 40,399 (1986). *See Holmes v. Director of Revenue and Taxation*, 827 F.2d 1243, 1244 (9th Cir. 1987).

which was ratified by the people in March 1977. Pursuant to section 202, it was approved by President Carter in October 1977. Proclamation No. 4534, Fed. Reg. 56,593 (1977).

It appears that in approving the Covenant and the Commonwealth Constitution, the federal government was potentially constrained by both the Trusteeship Agreement and the United States Constitution. PGI, however, relies solely on the United States Constitution to avoid the land alienation restriction.[15] We limit our decision to that issue.

Determination of the constitutionality of Article XII necessarily implicates the validity of Covenant section 805, which it implements, and Covenant section 501(b), because both seek to excuse section 805 from federal constitutional restrictions.[16] This is so because Congress'

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[15] As we have noted, Article 6 of the Trusteeship Agreement prohibits discrimination against any inhabitants of the Trust Territory in the exercise of their rights and fundamental freedoms. In *People of Saipan*, 502 F.2d 96 at 96-97, we held that the Trusteeship Agreement created judicially enforceable individual rights. Because PGI does not argue that the land alienation restrictions violate the Trusteeship Agreement, we express no opinion on the question.

[16] Section 501(b) provides in pertinent part:

> (b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Section [805]. . . .

Article 3 of the Trusteeship Agreement authorized the United States to "apply to the Trust territory . . . such of the laws of the United States as it may deem appropriate to local conditions and requirements."

powers derive from and are defined and limited by the Constitution. *See Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1165, 99 L. Ed. 2d 333 (1988); *Reid v. Covert*, 354 U.S. 1, 6, 1 L.Ed. 2d 1148, 77 S. Ct. 1222 (1957). Thus the threshold inquiry, essentially, is the same as that presented in *Atalig* – whether Congress could, under the territories clause,[17] properly exclude the particular provision of the United States Constitution from operation in the Commonwealth. Put another way, did Congress exceed its powers under Article IV, section 3 by insulating section 805 from the reach of the equal protection clause?

It is well established that the entire Constitution applies to a United States territory *ex proprio vigore* – of its own force – only if that territory is "incorporated."[18] Elsewhere, absent congressional extension, only "fundamental" constitutional rights apply in the territory. *Balzac v. Porto Rico*, 258 U.S. 298, 66 L. Ed. 627, 42 S. Ct. 343 (1922); *Atalig*, 723 F.2d at 688. *See Examining Bd. v. Flores de Otero*, 426 U.S. 572, 599-600, n.30, 40 L. Ed. 2d 65, 96 S. Ct. at 2280 n.30 (1976). Therefore, the question further reduces to this: Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?

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[17] Under Article IV, section 3 of the United States Constitution, Congress may "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

[18] A territory is incorporated if it was intended for statehood from the time of acquisition. *Atalig*, 723 F.2d at 688. It is undisputed that the Commonwealth is not an incorporated territory, though the precise status of the Commonwealth is far from clear. *See id.* at 691 & n.28.

In *Atalig*, a criminal defendant prosecuted in the Commonwealth sought the protections of the Sixth Amendment right to trial by jury, arguing that in *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14, 20 L. Ed. 2d 491, 88 S. Ct. 1444, 1447-48 n. 14 (1968), the Supreme Court had settled the question by holding that the right was fundamental and incorporated within the Fourteenth Amendment. This court rejected the broad proposition that those guarantees incorporated into the Fourteenth Amendment for application to the states must also be incorporated into the territory clause for application to the Commonwealth. What is fundamental for purposes of Fourteenth Amendment incorporation is that which "is necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. 149 at 149-50 n.14. In contrast, "fundamental" within the territory clause are "those . . . limitations in favor of personal rights' which are 'the basis of all free government.' " *Atalig*, 723 F.2d at 690 (quoting *Dorr v. United States*, 195 U.S. 138, 146, 147, 49 L. Ed. 128, 24 S. Ct. 808 (1904)). In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this *international* sense.

No court has yet confronted this particular question. Rather, this narrower definition of fundamentalness has been considered mostly with respect to the jury trial right. *E.g., Atalig; see also King v. Morton*, 172 App. D.C. 126, 520 F.2d 1140 (D.C. Cir. 1975). That is a distinguishable question. The jury trial guarantee is primarily a procedural right designed to safeguard the broader and more fundamental right to a fair trial protected by the due process clauses. So viewed, it is "easy to imagine" a system that omits the safeguard, but, through other

mechanisms, nevertheless achieves the broader, nonwaivable goal of assuring a fundamentally fair trial. *Duncan*, 391 U.S. at 150; *Atalig*, 723 F.2d at 690. In contrast, equal protection of the laws regarding access to long-term interests in real property is a substantive right which either does or does not apply.[19]

Nevertheless, we discern certain principles in *Atalig* and *King* which provide guidance. In *Atalig*, we distinguished Fourteenth Amendment and territorial incorporation by reference to their distinct purposes. Whereas the former "serves to fix our basic federal structure[,] the latter is designed to limit the power of Congress to administer territories under Article IV of the Constitution." *Atalig*, 723 F.2d at 689. The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to accommodate the unique social and cultural conditions and values of the particular territory. Moreover, we must be cautious in restricting Congress'

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[19] As *Flores de Otero* and other cases have made clear, residents of unincorporated territories are accorded fundamental rights guaranteed under either the Fifth or Fourteenth Amendments. *See Flores de Otero*, 426 U.S. at 600-601, 96 S. Ct. at 2280. Recognition of this fact, however, does not dictate that Article XII and Covenant section 805 automatically be subjected to strict scrutiny, for the protection afforded in the territories is not without its limits. *See Califano v. Torres*, 435 U.S. 1, 3 n.4, 55 L. Ed. 2d 65, 98 S. Ct. 906 n.4 (1977). It is thus important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

power in this area. *Id.* at 690. *See also Torres v. Puerto Rico*, 442 U.S. 465, 469-70, 61 L. Ed. 2d 1, 99 S. Ct. 2425 (1979).

King adopted a similar, though more explicit approach. In setting forth principles for the district court to follow in deciding whether the right to a trial by jury must be accorded in American Samoa, the test was formulated as follows:

> As Mr. Justice Harlan wrote in *Reid v. Covers*, "the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial should be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas."
>
> The importance of the constitutional right at stake makes it essential that a decision . . . rest on a solid understanding of [present conditions in the territory]. That understanding cannot be based on unsubstantiated opinion; it must be based on facts. . . . In short, the question is whether in [the territory] "circumstances are such that trial by jury would be impractical and anomalous." *Reid v. Covert*, 354 U.S. at 75, 77 S. Ct. at 1260 [Harlan, J., concurring].

King, 520 F.2d at 1147 (citations omitted). In our view, King sets forth a workable standard for finding a delicate balance between local diversity and constitutional command, and one which is consistent with the principles we stressed in *Atalig*. We therefore consider whether the claimed right is one which would be impractical or anomalous in NMI. We conclude that Wabol has carried its burden of demonstrating that this particular constitutional guarantee would be impractical and anomalous in the Commonwealth and therefore should not be imposed.

There can be no doubt that land in the Commonwealth is a scarce and precious resource. Nor can the vital role native ownership of land plays in the preservation of NMI social and cultural stability be underestimated. *See* L. Gurrero, *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* 174-76 (Dec. 6, 1976) (Unpublished manuscript). Land is the only significant asset of the Commonwealth people and "is the basis of family organization in the islands. It traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members." *Id.* at 175. It appears that land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives' social system. *Id.* The land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors. *See* Willens & Siemer, 65 Geo. L.J. at 1406. The legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the restrictions. *See* Marianas Political Status Commission, Report of the Joint Drafting Committee 3 (1975), *reprinted in Hearing to Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands" Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 376 (1975); *see also* Willens & Siemer, *supra*, at 1406-07. Section 805 is a "fundamental provision[ ] of th[e] Covenant" which may be modified only with the mutual consent of the governments of the Commonwealth and the United States. Covenant §105. And we must be mindful also that the

preservation of local culture and land is more than mere desideratum – it is a solemn and binding undertaking memorialized in the Trusteeship Agreement.

PGI does not contest the compelling justification for the restrictions. Rather, it attacks only the precision with which the restrictions operate to further these interests. This attack would have substantial force in an equal protection analysis, but it is of only minimal relevance to the threshold question of the validity of the Congressional waiver of equal protection restraints in sections 501(b) and 805.[20] A restriction need not be precisely tailored to qualify for exemption from equal protection scrutiny. It is therefore relevant, but not dispositive, that the restrictions only apply to freeholds and leaseholds of more than 40 years duration, or that they might have been drawn more narrowly to accomplish their goals.

We think it clear that interposing this constitutional provision would be both impractical and anomalous in this setting. Absent the alienation restriction, the political union would not be possible. Thus, application of the constitutional right could ultimately frustrate the mutual interests that led to the Covenant. It would also hamper the United States' ability to form political alliances and acquire necessary military outposts. *Cf. Torres,* 442 U.S. at 469-70, 99 S. Ct. at 2428-29. For the NMI people, the equalization of access would be a hollow victory if it led

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[20] Specifically, we consider this probative of the genuineness of the interest raised to justify deviation from the norm of constitutional application. The looser the fit, the more likely the asserted interest is mere pretext. Also, the harsher the impact on the individual resulting from the waiver of the constitutional protection, the greater the showing of interference with important government interest must be made to justify that waiver.

to the loss of their land, their cultural and social identity, and the benefits of United States sovereignty.[21] It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. *See* Laughlin, 2 U. Haw. L. Rev. at 386-88. Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition. We cannot say that this particular aspect of equality is fundamental in the international sense. It therefore does not apply *ex proprio vigore* to the Commonwealth. Accordingly, Congress acted within its power in enacting sections 501(b) and 805 of the Covenant, and Article XII is not subject to equal protection attack. We hold that the appellate division of the district court for the Northern Mariana Islands did not err in upholding Article XII of the Commonwealth Constitution against PGI's constitutional challenge.[22]

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[21] As one commentator has observed, free alienation is impractical in this situation not because it would not work, but because it would work too well. *See* Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. Haw. L. Rev. 337, 386 (1980).

[22] The district court's conclusion that equal protection analysis was applicable was error. We express no view as to the soundness of its application of equal protection principles. We

(Continued on following page)

B. Availability of reformation

The district court's conclusion that Article XII, section 6 precludes reformation of a lease agreement which violates the terms of section 1 is a question of law reviewed de novo. *Guam v. Yang*, 850 F.2d 507, 511 (9th Cir.1988) (en banc). Section 6 reads in pertinent part:

> *Enforcement.*
>
> Any Transaction made in violation of Section 1 shall be void ab initio.

The district court held simply that the constitution means what it says. We agree. The drafters' intent could not be clearer; any transaction which violates section 1 is completely without force and effect. The language of section 6 admits of no equitable exceptions. "[T]he most basic rule of statutory construction is that the plain language of the statute should be regarded as conclusive." *Fleming v. Department of Public Safety*, 837 F.2d 401, 405-06 (9th Cir. 1988). The legislative history reinforces our conclusion. *See* Gurrero, *supra*, at 187:

> This section provides that any transaction made in violation of section 1 is void from the beginning and has no force or effect. This means that if a person sells land to a person who is not of Northern Marianas descent, that transaction is void and has no effect and never has any consequence with respect to the title of the land.

(Continued from previous page)

exercise our duty to pass on the result, not the reasoning of the district court's decision, and to affirm on any ground supported by the record. *See City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir. 1985).

> The title remains in the person who tried to sell it.[23]

In light of this clear and unequivocal language and legislative history, we conclude that the lease was void ab initio. Because a void instrument cannot be reformed, *Hedges v. Dixon County,* 150 U.S. 182, 192, 37 L. Ed. 1044, 14 S. Ct. 71, 74 (1893), the district court properly held that the lease was invalid.

IV. CONCLUSION

We conclude that (1) the judgment of the Appellate Division of the District court for the Northern Mariana Islands is sufficiently final to support our jurisdiction under 48 U.S.C. § 1694b(c); (2) NMI Public Law No. 6-25 does not operate to divest this court of jurisdiction over this appeal; (3) the land alienation restrictions of Article XII of the Commonwealth Constitution are not subject to equal protection analysis; and (4) a lease which violates the terms of Article XII cannot be reformed. Accordingly,

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[23] On its face, section 6 appears to invite overreaching by lessors, for they can use the threat of enforcement to force renegotiation and prey upon the potential disruption of the lessee's expectations and investment. In fact, PGI argues that Wabol is doing just that. This was the basis for the trial court's attempt to reform the lease. If this is so, however, the proper forum for PGI's complaint is the political arena. On remand, the trial court may adjust the equities of the situation by compensating PGI for the amount expended in improving the property. *See* Gurrero at 187 (section 6 affects title only; it does not prevent an action for unjust enrichment or other rights arising in contract).

we affirm the district court in all respects and remand this case for further proceedings.

AFFIRMED and REMANDED.

Concepcion S. Wabol, et al.,
Plaintiffs-Appellees

v.

Victorino Villacrusis, et al.,
Defendants-Appellants.

Ninth Circuit No. 87-1736

United States Court of Appeals
for the Ninth Circuit

ORDER ON FILING SECOND AMENDED OPINION MARCH 16, 1992

The court has ordered the amended opinion filed on July 9, 1990, reported at 908 F.2d 411, to be amended as follows:

1. Change 908 F.2d at 422, footnote 19, to read as follows:

As *Flores de Otero* and other cases have made clear, residents of unincorporated territories are accorded fundamental rights guaranteed under either the Fifth or Fourteenth Amendments. *See Flores de Otero*, 426 U.S. 572, 600-01, 96 S. Ct. 2264, 2280, 49 L.Ed2d 65 (1976). Recognition of this fact, however, does not dictate that Article XII and Covenant section 805 automatically be subjected to strict scrutiny, for the protection afforded in the territories is not without its limits. *See Califano v. Torres*, 435 U.S.

1, 3 n.4, 55 L. Ed. 2d 65, 98 S. Ct. 906 n.4 (1978). It is thus important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

Concepcion S. Wabol, et al.,
Plaintiffs-Appellees

v.

Victorino Villacrusis, et al.,
Defendants-Appellants.

Ninth Circuit No. 87-1736

United States Court of Appeals
for the Ninth Circuit

ORDER ON FILING FIRST AMENDED OPINION JULY 9, 1990

The court has ordered the opinion filed February 20, 1990 [898 F.2d 1381] to be amended as follows:

1. At slip op. page 1819 [App. 11-12], four lines from the bottom, add after the cite the following parenthetical:

> (holding that no full faith and credit is warranted for decision rendered by court without jurisdiction);

2. At slip op. page 1821, first line [App. 13], replace the first full sentence with the following:

This court has jurisdiction over all appeals from the appellate division pursuant to section 403(b) of the Covenant, originally codified at 48 U.S.C. §1694c(b), which provides that those sections of Title 28 of the U.S. Code applicable to Guam shall be applied to NMI. 28 U.S.C. §1291 provides for Ninth Circuit jurisdiction over all appeals from the appellate division of the district court of Guam. Congress explicitly clarified section 403(b) by amending the implementing legislation in 1984 to provide that this court "shall have jurisdiction of appeals from all final decisions of the appellate division of the district court" of NMI. 48 U.S.C. §1694b(c).

3(a). At slip op. page 1822 [App. 15], after the first sentence of the first full paragraph, insert:

Although section 402 clearly authorizes the NMI to bestow or withdraw appellate jurisdiction on or from the district court in cases originating in the local trial courts, nothing in that section or elsewhere in the Covenant authorizes the NMI to define or limit the jurisdiction of this court or the U.S. Supreme Court. Despite appellees' assertion that "when the root is cut, the branches fall", *Smallwood v. Gallardo*, 275 U.S. 56, 61, 72 L. Ed. 152, 48 S. Ct. 23 (1927), authority over the appellate jurisdiction of the district court does not imply authority over this court. The cases relied on by appellees support only the principle that, once jurisdiction is withdrawn from a lower court, a *subsequent* appeal to a higher court will not save it from that withdrawal. Here, however, the appeal was pending in this court when the Act was passed, and had been properly taken from the appellate division before that court was divested of jurisdiction.

3(b). At slip op. page 1822 [App. 15], delete the words "When Congress amended the Covenant in 1984, * * * " and substitute the following:

> Furthermore, when Congress amended the implementing legislation in 1984 to clarify this court's misinterpretation of section 402(c) of the Covenant in *Sablan v. Santos,*

and continue from the words "it made clear its original intent * * * " to the end of the paragraph.

4. At slip op. page 1822, footnote 12 [App. 16], add to the end of the footnote the following:

> *Atalig* does not provide support for NMI's attempt to define and limit this court's jurisdiction. This court held in *Atalig* that, because section 403(b) of the Covenant, implemented at §1694b(c), bestowed jurisdiction on this court over appeals from the appellate division of the district court, NMI could authorize its government to appeal from criminal cases in the appellate division. Thus, the court relied solely on the jurisdiction granted to it under the Covenant, and has never authorized NMI to unilaterally define its jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS
APPELLATE DIVISION

Concepcion S. Wabol, et al., Plaintiffs-Appellants,
v.
Victorino Villacrusis, et al., Defendants-Appellees.

Civil Appeal No. 86-9006

Filed February 2, 1987

Before: LAURETA and KELLER*, District Judges, and MUNSON**

KELLER, District Judge:

BACKGROUND

This case revolves around a 1978 lease agreement between Filomenia W. Muna, lessor, and Philippine Goods, Inc. (hereinafter PGI), lessee. The lease was for a term of thirty years with a twenty year option to renew. The Wabols, appellants in this action, claim to be the owners of the property described in the lease pursuant to a partition, apparently among several family members including Filomenia Muna. Notwithstanding this claim of ownership, Muna continued to collect rent. As a result of Muna's actions, the appellants brought suit to collect the rent allegedly due from Muna as well as to invalidate the lease agreement with PGI.

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* The Honorable William D. Keller, United States District Judge, Central District of California, sitting by designation.

** The Honorable Alex R. Munson Chief Justice, Trust Territory High Court, sitting pursuant to 48 U.S.C. §1694b.

Having settled the first three counts of the four count complaint in a judgment by stipulation; the parties thereafter litigated with respect to count four. The fourth cause of action was against PGI to declare the lease void as a violation of Article XII of the Constitution of the Northern Mariana Islands (hereinafter Constitution) because PGI was not a person of Northern Marianas descent and the lease term exceeded forty years. Both appellants and appellees moved for summary judgment. The trial court denied appellees' motion and denied appellants' motion "except to the extent that defendants have a lease on the subject premises for the term of 30 years, ending on January 1, 2009 and only an option to extend or renew for an additional 10 years to January 1, 2019." It is this ruling that is the subject of our review.

Count Four, as discussed above, involves an interpretation of Article XII of the Constitution. Article XII of the Constitution provides:

> *Section 1: Alienation of Land.* The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.
>
> *Section 2: Acquisition.* The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee does not hold the permanent or long-term interest in real property for more than five years.
>
> *Section 3: Permanent and Long-Term Interests in Real Property.* The term permanent and long-

term interests in real property used in section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.

Section 4: Persons of Northern Marianas Descent. A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations. A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors at least fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by section 4.

Section 6: Enforcement. Any transaction made in violation of section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth

acquired by the corporation after the effective date of this Constitution shall be forfeited to the government.

DISCUSSION

I. APPLICABILITY OF ARTICLE XII TO THE LEASE

There is no question that the lease falls within the prohibitions of Article XII of the Constitution. The term of the lease is for thirty years with a twenty year option to renew which can be exercised by PGI without any reciprocal obligation required of the lessor. Under §3 of Article XII, a leasehold interest exceeding forty years, including renewal rights, is considered to be "long-term" for purposes of §1. Therefore, based upon the language of §1, the land can only be transferred to "persons of Northern Marianas descent."

As for the alienage of PGI, §5 of Article XII lists four requirements that a corporation must meet in order for it to be considered a "person of Northern Marianas descent": 1) it must be incorporated in the Commonwealth; 2) it must have its principal place of business in the Commonwealth; 3) it must have a board of directors, 51% of whom must be of Northern Marianas descent; and, 4) it must have outstanding voting shares of which 51% are owned by persons of Northern Marianas descent. PGI fails the above test for at least two reasons: first, only one-third of its directors were of Northern Marianas descent; and, second, only fifty percent of the stock was owned by persons of Northern Marianas descent. Accordingly, PGI is an alien corporation and the restrictions against alienation enunciated in §1 apply to the corporation.

II. APPLICATION OF THE PROHIBITION AB INITIO

Section 6 of Article XII of the Constitution says that "Any transaction made in violation of section 1 shall be void ab initio." The plain meaning of "void ab initio" is a nullity from the beginning. The language of §6 explicitly states that this lease agreement was nugatory from the time of its signing and thereafter.

The trial court commenced its analysis by stating that the sale of a freehold interest would be void from the outset and would be neither divisible nor subject to reformation. Yet, the judge differentiated between the sale of a freehold interest and the acquisition of a leasehold interest. Although this court can understand the concern of the trial judge, the fact remains that given the purpose of the legislation, there is no legal basis for such a distinction.

A number of cases cited by the appellants support the proposition that a lease can't be divided. *See, e.g., Hedges v. Dixon County,* 150 U.S. 182, 14 S.Ct. 71 (1893); *Eliason v. Eliason,* 151 Mont. 409, 443 P.2d 884 (Mont. 1968). In these cases, the courts invalidated the entire obligation and not just a part thereof. In *Parthey v. Beyer,* 238 N.Y.S. 412 (1930), the New York court held that an agricultural lease for ten years with an option to renew for five years violated the New York constitutional prohibition against leases of agricultural land exceeding twelve years. The court went on to hold that an option to purchase the land, which was part of the underlying lease agreement, must also fail. The court wrote, "[T]herefore, the doctrine that where a promise is made upon a consideration, part of which is unlawful, the whole contract is void applies here." *Parthey,* 238 N.Y.S. at 417.

Based on the foregoing, this Court holds that "void ab initio" means what it says; that the lease was void from the beginning.

III. CONSISTENCY OF ARTICLE XII OF THE CONSTITUTION WITH THE MANDATE OF §805(a) OF THE COVENANT

On February 15, 1975, the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (hereinafter Covenant) was signed. After approval by the United States Congress, it was enacted on March 24, 1976. The Covenant sets out the framework for the government of the Northern Mariana Islands (hereinafter NMI), their constitution and their relationship to the United States.

Section 805(a) of the Covenant mandates certain restraints on the alienation of land to foreigners. Article XII of the Constitution was intended to implement that mandate. However, appellees contend that the two documents are inconsistent because the Covenant discusses "alienation" and the Constitution discusses "acquisition". Appellees' argument is a spurious one. It should be noted that the Constitution does indeed discuss alienation. Section I of Article XII begins with the words "alienation of land." Moreover, §805(a) of the Covenant discusses "acquisition." It goes on to expressly say " . . . to restrict the *acquisition* of such interests to persons of Northern Marianas descent." (Emphasis added). Therefore, both the Covenant and the Constitution discuss both "alienation" and "acquisition". Besides, alienation and acquisition are opposite sides of the same coin. Accordingly, Article XII effectively implements the mandate of §805 of the Covenant.

IV. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The appellees contend that Article XII of the Constitution violates the fourteenth amendment of the United States Constitution. Such an analysis must overcome the fact that the first two words of the fourteenth amendment, say "no state"; thus, a prerequisite to invoking the fourteenth amendment is a finding of state action. And, the fourteenth amendment has been held not to apply to territories *ex proprio vigore. See, District of Columbia v. Carter,* 409 U.S. 418, 424-25 n. 11, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973); *South Porto Rico Sugar Co. v. Buscaglia,* 154 F.2d 96, 100 (1st Cir. 1946).

However, the analysis goes further. Although the fourteenth amendment may not apply independently of any congressional action, it does apply pursuant to the Covenant, enacted by the United States Congress as law. Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. §1681. Section 501(a) of the Covenant explicitly makes the fourteenth amendment applicable to the NMI. It states in pertinent part that,

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Amendments 1 through 9, inclusive; . . . *Amendment 14, Section 1*; . . . (emphasis added).

Yet, §501(a) is limited by §501(b) which states,

> The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of

> the United States to consent to sections 203, 506 and 805 and the proviso in Subsection (2) of this Section.

Included within the exceptions enumerated in §501(b) is §805, which discusses land alienation and states,

> Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic self-sufficiency:
>
> (a) will until twenty five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and
>
> (b) may regulate the extent to which a person may own or hold land which is now public land.

Accordingly, the question becomes whether Congress, pursuant to its powers over territories set forth in Article IV §3(2) of the United States Constitution, could approve a Covenant which contained a provision, §805, which might violate the Constitution.

Congress cannot pass any law which violates the United States Constitution. *U.S. v. Odneal,* 565 F.2d 598

(9th Cir.1977), *cert. denied,* 435 U.S. 952, 98 S.Ct. 1581, 55 L.Ed.2d 803 (1978). Although the fourteenth amendment does not apply to acts by the federal government. *District of Columbia v. Carter,* 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), *reh'g denied,* 410 U.S. 959 (1973), the fifth amendment has been construed to contain an equal protection component. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Therefore, the question is whether congressional approval of §805 violate the equal protection clause of the fifth amendment. As discussed earlier, §805 discriminates based on alienage. Ordinarily, the test for such discrimination is deferential to the political branches of the federal government. *Mathews v. Diaz,* 426 U.S. 67, 81-84, 96 S.Ct. 12, 1883, 48 L.Ed.2d 478 (1976). More particularly, in this instance, the appropriate test is whether the special treatment can be rationally tied to Congress' unique obligation vis-a-vis the Northern Mariana Islands.

In analyzing the applicability of the fourteenth amendment to the NMI, the trial court aptly analogized the situation in the NMI to that of the American Indians. With respect to the Indians, the courts have held that traditional analysis does not apply to governmental action protecting Indians. *United States v. Decker,* 600 F.2d 733 (9th Cir. 1979), *cert. denied,* 444 U.S. 855 (1976). The proper test regarding Indians was stated in the following way: "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Decker,* 600 F.2d at 741. This Court agrees with the trial judge that this is and should be the proper test for the NMI; that this is, a rational relation to Congress' unique obligation to the peoples of the NMI.

Given the history of occupation by foreigners as well as the scarcity of land and the cultural traditions of the

people, all of which are discussed in the lower court's order as well as in 65 Georgetown Law Journal 1373; Covenant §805 and Article XII of the Constitution are certainly rationally related to the unique obligation which the United States Congress owes to the people of the NMI. Therefore, these provisions survive scrutiny under the fifth amendment.

Appellees further contend that §5 of Article XII, which defines an alien corporation, does not survive Fourteenth Amendment scrutiny and exceeds §805(a) of the Covenant. Given the foregoing analysis, it must survive such scrutiny, in that if the elements were not required, it would be possible for a foreigner or a group of foreigners, to incorporate themselves, buy land and circumvent the plain intent of §805(a) of the Covenant and Article XII of the Constitution.

Yet another argument raised by the appellees is that Article XII regulates participation in corporations. However, all that Article XII restricts is the purchasing of land by alien corporations, an activity which when consummated by corporations can be far more damaging to the policies underlying §805(a) than individual ownership of the land by aliens. Thus, these restrictions are in keeping with the policy considerations of ensuring that the precious resource of land is not usurped from the NMI.

V. STANDING TO SUE

Appellees contend that pursuant to §6 of Article XII, plaintiffs do not have standing to sue because the land escheats to the state. However, since the corporation was an alien corporation from the outset of the transaction, the lease was void ab initio and the appellants have an interest in protecting their land. Accordingly, the appellants have shown that they personally suffered some

actual injury as a result of the illegal conduct of the defendants. *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979). Therefore, they do have standing.

VI. ESTOPPEL

Appellees raise a host of issues under the theory of estoppel and related principles. Basically, appellees first contend that by signing or approving the lease with PGI, appellants are estopped from challenging the validity thereof. In order to successfully assert estoppel, the following must be shown: the party to be estopped must be apprised of the facts; the other party must be ignorant of the true state of the facts; the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and, the other party must rely on the conduct to its prejudice. *California Cigarette Con., Inc. v. City of Los Angeles,* 53 Cal.2d 865, 869, 3 Cal.Rptr. 675, 678 (1960). PGI has failed to demonstrate the requirements necessary for a successful application of the estoppel doctrine. For example, PGI failed to demonstrate that it was ignorant of its own status as an alien corporation.

More importantly, public policy dictates that estoppel is inapplicable in this instance. *Parthey v. Beyer,* 238 N.Y.S. 412, 418 (1930). The purpose of Article XII is to protect native born Northern Marianas islanders from foreign exploitation. To hold that once they have been exploited they are estopped from protecting themselves would be to turn the rule on its head.

Appellees also contend that appellants' complaint is inconsistent because it brings suit on the contract in count two and then seeks to assert the non-existence of

the contract in count four. However, a more careful reading of count two shows that appellant is suing not on the contract, but on a theory of implied contract. Furthermore, such inconsistent pleading is permitted. 5 C.Wright & A. Miller, *Federal Practice and Procedure* §1283 (1969).

The appellees further urge that appellants benefited from a judgment order and then appealed the part which they found to be disadvantageous. The general rule is that the acceptance of the fruits of a judgment is inconsistent with the right to appeal the judgment. *Wold v. League of Cross of Archdiocese of San Francisco,* 107 Cal. App. 344, 290 P. 260 (1930). Notwithstanding the general rule, an appeal can be taken if it is from a decision on a separate and distinct cause of action. *Wold,* 107 Cal. App. 344. In this instance count four was a separate and distinct cause of action from the other counts.

More importantly, the language of the settlement judgment specifically reserved plaintiff's right to appeal the court's decision regarding count four. On page three of the judgment dated February 18, 1986, it explicitly states, "Approved as to form and content, *without prejudice to appeal from summary judgment of July 31, 1985.*" (emphasis added). Therefore, appellants were justified in appealing count four of their complaint.

VII. MOOTNESS

Appellees point out that in February of 1985, Article XII of the Constitution was amended so as to permit a lease for a period of 55 years. The lease in this case ran for 50 years; therefore, appellees contend that the issue has been mooted by the amended law. Generally speaking, however, changes in statutory laws and constitutional provisions apply prospectively, *United States v. Security Indus. Bank,* 459 U.S. 70, 103 S.Ct. 407, 413, 74

L.Ed.2d 235 (1982) (statutory laws); *City of San Antonio v. San Antonio Public Service Co., Tex.*, 255 U.S. 547, 41 S.Ct. 428, 65 L.Ed. 777 (1921); 16 C.J.S. Const. Law §36 (1984) (constitutional provisions), unless there is a clear manifestation of intent that they should be applied retroactively. *Schalow v. Schalow,* 163 Cal.App.2d 448, 329 P.2d 592 (1958). Here, no such intent was proffered by the parties. Therefore, even though the lease would be valid if entered into today, it must be judged on the law as it existed when the contract was formed and not by the applicable law during this appeal. *Interinsurance Exch. of Auto Club of Southern Cal. v. Ohio Ins. Co.*, 58 Cal.2d 142, 23 Cal.Rptr. 592 (1962).

Furthermore, a contract, or provision thereof, which violates public policy when made is not validated by a later statutory change in that public policy. *See, Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal.App.3d 26, 130 Cal.Rptr. 446 (1976). Therefore, this lawsuit is not moot.

CONCLUSION

Based on the foregoing, the written lease agreement between the Wabols and PGI is declared void ab initio. The case is REVERSED AND REMANDED to the Commonwealth Trial Court to determine the terms and conditions of any obligations which may have arisen in quasi contract or as a result of a periodic tenancy. Additionally, the appellees have made several improvements on the land. On remand, the court should determine the amount, if any, of payment appellees should receive from the appellants in order to prevent unjust enrichment for

those additions. The remainder of the trial court's rulings are AFFIRMED.

/s/ Alfred Laureta
Judge Alfred Laureta

/s/ Alex R. Munson
Judge Alex R. Munson

/s/ William D. Keller
Judge William D. Keller

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH TRIAL COURT

Concepcion S. Wabol, et al., Plaintiffs,

v.

Victorino Villacrusis, et al., Defendants.

Civil Action No. 84-397

SUMMARY JUDGMENT

Filed August 1, 1985

Plaintiffs have moved for summary judgment on Count IV of the Complaint and the defendants, Victorino Villacrusis, Philippine Goods, Inc., and Transamerica Corp., (referred to herein collectively as the defendants) have filed a cross motion to dismiss plaintiffs' complaint. The co-defendant, Filomenia W. Muna, is in apparent default.

The plaintiffs (sometimes referred to herein as Wabols) moved to strike the affidavit of defendant Victorino U. Villacrusis which purports to support the cross motion. At the oral argument of this matter the motion was granted as the affidavit does not comply with Com.R.Civ.P. 56(e).

I. BACKGROUND

This case revolves around a 1978 lease agreement between Filomenia W. Muna as lessor and Philippine Goods, Inc. as lessee. A copy of the eight page lease is attached to the complaint and marked Exhibit 1. The Wabols claim to be the owner of the property described in the lease pursuant to a partition, apparently among several family members including Felomenia [sic] W. Muna. It is further claimed that they are entitled to the rent from the lease dating back to its inception in 1978. Defendant,

Transamerica Corporation claims the right to possession to a portion of the leased premises by virtue of a sublease from Philippine Goods, Inc. Thus the claim of Transamerica Corp. rests on the validity of the leasehold rights of Philippine Goods, Inc.

Count IV, to which plaintiffs motion is directed, asserts that since the defendants are not persons of Northern Marianas descent, the lease is void under Article XII of the Constitution of the Northern Mariana Islands (Constitution).

Article XII of the Constitution provides:

Section 1: Alienation of Land.

The acquisition of permanent and long term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2: Acquisition.

The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee does not hold the permanent or long term interest in real property for more than five years.

Section 3: Permanent and Long-Term Interests in Real Property.

The term permanent and long-term interests in real property used in section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.

Section 4: Persons of Northern Marianas Descent.

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Mariana Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas Chamorro or Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations.

A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors of at least fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by section 4.

Section 6: Enforcement.

Any transaction made in violation of Section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the

effective date of this Constitution shall be forfeited to the government.

II. IS THE LEASE ENTERED INTO BY THE DEFENDANT, PHILIPPINE GOODS, INC. PROHIBITED BY ARTICLE XII?

The answers to requests for admissions demonstrate that there is no genuine issue of fact as to the status of the defendant Philippine Goods, Inc. There are three directors of Philippine Goods, Inc., Victorino U. Villacrusis, Maria N. Manalo, and Leonardo C. Villacrusis. Victorino U. Villacrusis and Leonard C. Villacrusis are not persons of Northern Marianas descent. Thus, the corporation fails to meet the definition found in section 5 of Article XII of the Constitution. Additionally, the ownership of the stock of Philippine Goods, Inc. is owned by persons of Northern Marianas descent *only* to the extent of 50%.[1]

The lease provides for a 30 year term with an "Option to extend term of Lease" for an additional twenty years pursuant to paragraph 3 of the lease. Article XII of the Constitution proscribes the acquisition of a long-term interest in real property which is more than forty years including renewal rights (Sections 1 and 3) Though the defendants argue that the lease does not violate Article XII, it is found that it clearly does.

The distinctions the defendants argue between acquisition and renewal rights are not persuasive. Article XII addresses and includes a lease such as the one before the court. Simply stated, at the time of the execution of the lease, the defendant Philippine Goods, Inc. acquired a leasehold interest in land in the Commonwealth for more

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[1] These facts are obtained by reference to the responses to the plaintiffs' request for admissions, numbers 7 thru 12.

than forty years. The option to extend the lease does not depend on any act on the part of the lessor. It is strictly the option of Philippine Goods, Inc. To put it in the terms of Article XII, the lessee has a leasehold interest for 50 years including renewal rights. To accept defendants' argument, would result in an unintended and easy circumvention of the entire purpose of Article XII.[2]

Thus under the undisputed facts of this case, it is found that the lease is prohibited by Article XII.

III. DO THE PLAINTIFFS HAVE STANDING TO SUE?

The troubling issue of standing to sue by the Wabols was raised at oral argument and if the Wabols do have standing, what is to be done about enforcing Article XII, assuming that Article XII is constitutional.

Article XII of the Constitution provides no hint as to who enforces its provisions. On the face of the complaint (which includes the referred to lease agreement as attached) the plaintiffs cannot be said to be the real parties interest in so far as any action on the lease is concerned. Com.R.Civ.P 17(a).

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[2] Philippine Goods, Inc. essentially argues that it "acquired" only a 30 year lease and it would not acquire the extended 20 year term until it exercised the option in the year 2008. Thus, it is asserted, there is no breach of the 40 year term. Additionally, defendants argue that the Option to extend is not the same as renewal rights. Whatever appellation is used, it is concluded that Philippine Goods, Inc. acquired a 50 year leasehold interest including the extension, option or renewal rights, any of which brings the lease within the definition of the proscribed interest in Article XII of the Constitution.

Count IV is an action by the plaintiffs to enforce Article XII of the Constitution and have the court declare the lease void *ab initio*. Section 6 of Article XII states that in the case of a corporation, the prohibited interest in the land is forfeited to the government and not to the plaintiffs.

It is the plaintiffs' position that whether or not they have a claim to the land, they, as persons of Northern Marianas descent, have the right to sue to enforce Article XII. This right is based on broad social and economic grounds.

The history of the Constitutional Convention shows that the purpose underlying Article XII was to conserve the land of the Commonwealth for the indigenous people because of its limited quantity. (See, for example, Covenant to Establish a Commonwealth, § 805, Analysis of the Constitution, pp. 164-167, and Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, pp. 116-118).

Plaintiffs argue that due to the significance of restrictions placed on alien property ownership in the Commonwealth, any person of Northern Marianas descent should be able to bring suit to enforce the provisions of Article XII. Otherwise, it is argued, the restrictions become meaningless since the seller or lessor who has received his/her price will not likely sue to cancel or rescind the very transaction he or she made. Equitable principles would appear to come into play under such circumstances.

Indeed, whoever has standing to object to any lease or sale of land in violation of Article XII is confronted with serious equitable questions. They are apparent here.

It is held that the plaintiffs have alleged sufficient facts to give them standing. They allege they are the

owners of the property, they are entitled to the rental from the property and the lease is in violation of the rights of the plaintiffs as owners of the land. The essential element of the standing requirement is that "the plaintiff . . . show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v Village of Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979).

Put another way, the party who invokes the court's authority requires the plaintiff to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Valley Force Christian College v Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

IV. CAN THE PROVISIONS OF ARTICLE XII OF THE CONSTITUTION OF THE COMMONWEALTH BE SUSTAINED IN VIEW OF THE EQUAL PROTECTION PROVISION OF THE COMMONWEALTH CONSTITUTION AND THE EQUAL PROTECTION PROVISION OF THE U.S. CONSTITUTION?

Article I, Section 6 of the Commonwealth Constitution provides:

> "No person shall be denied the equal protection of the laws. No person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, religion, ancestry or sex."

Pursuant to Section 501(a), Article V of the Covenant to Establish a Commonwealth of the Northern Mariana

Islands In Political Union with the United States of America (Covenant), Amendment XIV, Section 1 of the United States Constitution is applicable in the Commonwealth as if it were one of the several States of the United States.

It reads:

> Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The defendants argue that Article XII of the Commonwealth Constitution runs afoul of the equal protection clauses of both the Commonwealth Constitution and the United States Constitution.[3]

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[3] The defendants also refer obliquely to the due process and privileges and immunities clauses of the respective Constitutions. But, as noted by defendants in their memorandum:

> "Two other-potential basis for attacking the restriction on land alienation – the due process and privileges and immunities clauses. . . . As a practical matter, they are subsumed within the analysis of the primary issue: whether the classification drawn in the constitution separating those who are eligible to acquire long-term real property interests in the Northern Marianas from those who are not is constitutionally permissible. An equal protection violation may, as a matter of constitutional law, amount to a

(Continued on following page)

There is no doubt that Article XII is discriminatory in nature. The privilege of acquiring and enjoying property or a long term interest therein is a basic right. *Truax v Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254. To declare that only certain persons can have that right while others can not due to their ancestry is patently offensive to the equal protection clauses cited above. Indeed, the equal protection clause of the Commonwealth Constitution is more specific than that of the United States Constitution as the former prohibits discrimination on the basis of ancestry.

Notwithstanding these provisions, can Article XII still pass constitutional muster?

The equal protection clause guarantees that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property. *Truax v Corrigan, supra; Eldridge v Trezevant,*

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finding that the classification causes such invidious discrimination that it offends the guarantee of due process as well as that of equal protection and, hence, that the governmental interest served by the classification does not justify the resulting interference with the United States citizen's right to acquire property in the islands. Although equal protection and privileges and immunities claims have occasionally been treated separately, the constitutional analysis of the two issues has generally been merged into a single inquiry, couched largely in terms of equal protection." Citing 65 Georgetown Law Journal 1373, 1452; *Sei Fuji v State*, 38 Cal. 2d 718, 729-30, 242 P.2d 617, 615, 625 (1952); *State v Oakland*, 129 Mont 347, 352, 287 P.2d 39, 42 (1955).

160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 2d 490; *Halligan v Davis*, 146 U.S. 314, 13 S.Ct. 105, 36 L.Ed. 986.

The equal protection clause provides a basis for challenging legislative (or state constitutional) classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way. *Jones v. Helms*, 452 U.S. 412, 101 S.Ct. 2434, 69 L.Ed. 118.

Purposeful discrimination is necessary to create a violation of the equal protection clause. *City of Mobile v Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 2d 47.

The equal protection provisions apply to any person (and corporation) within the jurisdiction of the Commonwealth. Article 1, Section 6, Commonwealth Constitution; Amendment XIV, Section 1, U.S. Constitution. The clause is universal in its application to all persons within the territorial jurisdiction. *Yick Wo v Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

The equal protection clause of the Fourteenth Amendment does not prevent the states (Commonwealth) from making reasonable classifications among persons within the jurisdiction of the entity. *Western & Southern Life Ins. Co. v State Bd. of Equalization*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed. 2d 514.

If the classification rests on grounds wholly irrelevant to the achievement of any legitimate governmental objective, it will not pass constitutional muster. *Harris v McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed. 2d 784.

Article XII of the Commonwealth Constitution is somewhat more complex than the usual legislative enactment which is attacked on equal protection grounds.

The seed for Article XII probably was planted as far back as the Japanese administration of the Northern Mariana Islands which commenced in 1914. After the Japanese seized control of the Islands in 1914 from Germany, the amount of public land available for the inhabitants to use for residences and farms decreased drastically because the Japanese government developed large parcels of land for its sugar cane industry and for governmental or military purposes. The reservoir of extra land which existed in the German administration disappeared to a large extent. *See, Land Tenure Patterns,* Vol. 1, pp. 221-222.

Soon after the end of the World War II, the United States administration recognized the limited amount of land and the importance of land for the subsistence economy of the islands and caused to be implemented a restriction on the alienation of land which was incorporated into the laws of the Northern Mariana Islands as well as the rest of the United Nations Trust Territory.[4]

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[4] The first code of laws of the Trust Territory of the Pacific Islands was promulgated by Executive Order No. 32 on 12/22/52 by the High Commissioner. The Code was revised in 1959 by the High Commissioner and the 1966 edition of the Code incorporated, in Section 900, the restriction on the alienation of land. This same provision was re-incorporated into the 1970 edition of the Code as 57 TTC § 11101. Even prior to 1952, the almost complete domination by the U.S. military and isolation of the islands had the effect of prohibiting non-indigenous persons from purchasing land in the islands. Section 900 of the Trust Territory Code reads:

> "Only citizens of the Trust Territory may hold title to land in the Trust Territory; Provided, however, that nothing herein shall be construed to divest or impair the right, title or interest of noncitizens or their heirs

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The desire of the people of the Northern Mariana Islands to maintain control over their land was exhibited during negotiations with the United States when the Covenant was written. As a result, Section 805 of Article XII was formulated and approved by the people of the Northern Mariana Islands and the United States Congress. Section 805 specifically gave the green light to "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent." The response was the inclusion of Article XII of the Commonwealth Constitution which was subsequently approved by the electorate and the Government of the United States pursuant to Article II, Sections 201 and 202 of the Covenant.[5]

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or devisees, in lands in the Trust Territory held by such persons prior to December 8, 1941, and which have not been vested in the Area Property Custodian by Vesting Order dated September 17, 1951, or, if vested, are released from the terms of said order by direction of the High Commissioner; Provided further, that nothing herein shall be construed to prevent the Government of the Trust Territory from holding title to lands in the Trust Territory."

[5] As might be expected, concern was expressed by several commentators as to the challenges to any restriction on land alienation which could be made in view of the equal protection provisions of the United States Constitution. See, Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, dated 2/15/75, pp. 116-118; Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands, 12/6/76, pp. 163-167.

This case presents the first direct attack on the constitutionality of Article XII. Several cases before have skirted the issue and were decided on different grounds.[5] [sic]

The established rule is this court will not decide – constitutional issue when there are other avenues available and will strike down a provision as unconstitutional only where it is clear beyond reasonable doubt. *Camacho v Civil Service Commission,* CTC C.A. 80-11, aff'd 666 F.2d 1257.

In respect to possible alternate grounds to resolve this matter, the court is convinced that the constitutionality of Article XII must be determined as it is the crux of the dispute between the parties.

The unique content of Article XII is paralleled by the formulation and approval process which led to its existence. Article XII, has not only received the approval of the electorate of the Northern Mariana Islands and the President of the United States but the Covenant (including § 805) has been approved by the U.S. Congress and enacted as law. Joint Resolution of March 24, 1976, Public Law No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. § 1681 note.

The Fourteenth Amendment of the U.S. Constitution is a restriction on the Commonwealth Government but does not extend to authority exercised by the government of the United States. *District of Columbia v Carter,* 409 U.S. 602, 93 S.Ct. 602, 34 L.Ed. 613.

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[5] [sic] On reflection, it appears that the previous cases also did not involve the high stakes represented here. The incentive to prosecute vigorously a constitutional issue of the magnitude involved in this case sometimes (usually?) requires fairly substantial economic rewards.

This potential legal quagmire of dual approval is avoided, however, by the result hereinafter reached.

The ultimate question which must be answered is whether the *classification* established in Article XII can pass equal protection scrutiny. There is no doubt that a state (Commonwealth) may classify persons and objects for the purpose of legislation. *District of Columbia v Brooke*, 214 U.S. 138, 29 S.Ct. 560, 53 L.Ed. 941; 16A AmJur 2d, *Constitutional Law*, § 746.

The classification embodied in Article XII is fairly clearly set forth. Those who have the unrestricted right to own fee simple interests or longer than 40 years leasehold interests in the Northern Mariana Islands are defined in Section 4. From the history of the formation of the Covenant and the Constitution and the wording in the respective documents, there is no doubt there was a great consciousness about the importance of ownership of land in the Commonwealth because of the culture and traditions of the people of the Northern Mariana Islands. There was also grave concern about the potential for exploitation and the buying of land by "foreign" individuals and corporations which possessed the power to overwhelm the new and struggling Commonwealth.

In so far as the culture and traditions are concerned, they are imbedded in the everyday lives of the Chamorro and Carolinian people.

By the time of the Spanish administration period in the islands, the land tenure system for the Chamorros had become directed to individual ownerships as contrasted with clan or lineage ownership. At the same time the concept of family land arose (*Iyon Manaina*) where the tendency was to keep the land within the family. This was (and still is) being done by a partida whereby the head of

the family divides the land among his/her issue or designate the land to go to certain issue. The most common event occurs when the father, as the head of the family, designates/divides the land for his sons with his spouse having a right akin to a life estate interest. The sons are expected to take care of their mother until her death. Any daughters are assumed to be taken care of by marrying males with land designated to them in a similar fashion in another family. Land Tenure Patterns, Vol. 1, pp. 222-225; Spoehr, Fieldana; Anthropology, p. 133 et seq; *Estate of Torres,* CTC C.A. 79-163; *Estate of Camacho,* CTC C.A. 82-72; *Palacios v. Coleman,* DC. NMI C.A. 78-49.[7]

Carolinian land tenure is significantly different.[8] Land is owned by lineages with succession through the matrilineal members. Upon the death of an elder female member who holds the land in the form of a trust, the land is not divided but kept intact for the use of the lineage members. Ownership in the form of a trust relation ship is passed down to the eldest surviving matrilineal member. Land Tenure Patterns, Vol. 1, pp 225-227.

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[7] The recently enacted Probate Code of the Commonwealth, Public Law 3-106, recognizes the concept of family land. The Code defines "Ancestors' Land" as that being acquired by a person from one or more Chamorro ancestors of Northern Marianas descent. Section 7(a), Chapter 1. Section 2 of Chapter IX provides that intestate succession of ancestors' land is in equal shares to the surviving issue but with a life estate in the spouse.

[8] The Carolinian society in the Northern Mariana Islands developed shortly after the turn of the century when people from the atolls north and west of Truk came to the Marianas. They maintained their traditional land tenure pattern here.

However, the possibility of a *partida* similar to Chamorro custom exists. *Estate of Taisakan,* CTC C.A. 79-107, aff'd D.C.NMI App. Div. DCA 81-9002.[9]

A survey of the various cases in this court which concern customary land rights and the fairly recent enactment of the Commonwealth Probate Code, Public Law 3-106, demonstrates very clearly that the indigenous people of the Northern Mariana Islands do recognize and follow the land customs established over the past many years. Section 805 of the Covenant is not a facade or ruse to give sanction to the formation and adoption of Article XII of the Constitution just so the people of Northern Marianas descent can have an economic advantage over persons not similarly situated.

The traditions, the culture, the importance of the ownership of land and the potential for exploitation by more powerful economic sources are real and not imagined.

Does this provide a sufficient basis to uphold Article XII in light of the Fourteenth Amendment of the U.S. Constitution? It is concluded that it is.

To begin with, the importance and strength of the Covenant cannot be ignored. Had Article XII strayed away from the meaning and intent of Section 805, another conclusion would result. However, Article XII complies and is compatible with Section 805. The only significant questions that had to be answered by the Constitution was the definition of "long-term interests" and "persons

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[9] Public Law 3-106, the Probate Code, at Chapter 1, Section 7(1) defines "family land" and incorporates the traditional Carolinian trust arrangement. Chapter IX, Section 4 sets forth the succession of Carolinian family or lineage land which is essentially the same as set forth above.

of Northern Marianas descent". The former is any lease or interest over forty years. This, certainly, is reasonable. The definition of persons of Northern Marianas descent is likewise reasonable. Only one-quarter blood is required and certain persons born or domiciled in the Commonwealth by 1950 are included.

It is concluded that Article XII as formulated by the Constitutional Convention and as approved by the electorate satisfies the terms of Section 805 of the Covenant and is well within the parameters specified.

That the Covenant is to be given significant weight and credence even if it should conflict with traditional notions of constitutional rights as might be applied in the United States, is now well settled. *Commonwealth of the Northern Mariana Islands v Atalig*, 723 F.2d 682 (9th Cir. 1984).

Atalig concerned the issue of whether the terms of the Covenant and Commonwealth Constitution relating to restricting jury trials in criminal cases could withstand attack on U.S. constitutional grounds in light of Supreme Court cases declaring that the right to a jury trial is a fundamental right. The court rejected the application of the United States cases as they might apply to the Commonwealth and held, *inter alia*, that the U.S. Congress, exercising its power to administer territories under Article IV of the Constitution, had the flexibility to accommodate the particular social and cultural conditions of areas such as the Northern Mariana Islands. *Atalig, supra*, 723 F.2d at 690.

In addition to the support that can be derived from the Covenant and *Atalig* for Article XII, it appears a close analogy can be drawn to the restriction of alienation of lands within Indian reservations in the United States

itself.[10] The overall scheme, plan and reason for the restrictions is to prevent the exploitation of the Indians by persons who are in a stronger position, economically. *Federal Power Com. v Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584; *United States v Reily*, 290 U.S. 33, 54 S.Ct. 41, 78 L.Ed. 154; *Bunch v Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290.

Traditional equal protection analysis, which requires a compelling state interest to justify invidious racial discrimination, does not apply to legislation on governmental action favoring Indians. *United States v Decker*, (1979, CA 9) 600 F.2d 733.

For many years it has been established that the U. S. Congress possesses the plenary power and duty to exercise care and protection of the Indians within the United States. *United States v McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410; *Sisseton v United States*, 277 U.S. 424, 48 S.Ct. 72 L.Ed. 939. This power includes the right to impose restriction on the rights of Indian wards of the United States to deed or lease lands allotted to them. *Bunch v Cole*, supra.

This does not mean that all U.S. Congressional legislation is immune from judicial review of the U.S. Supreme Court. Challenges to legislation based on the equal protection component of the Fifth Amendment of the U.S. Constitution will be entertained. But, even then, the standard of review is that the legislative judgment should not be disturbed as long as the special treatment

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[10] The significant difference is, generally speaking, that the restriction on alienation of Indian lands is based on an allotment of land by the U.S. to an allottee and the restriction runs with the land and is not personal to the allottee. *Bowling v United States*, 233 U.S. 528, 34 S.Ct. 659, 58 L.Ed. 1080; *United States v Noble*, 237 U.S. 74, 80, 35 S.Ct 532, 59 L.Ed. 844.

of the statute can be tied rationally to the fulfillment of Congress' unique obligation toward Indians. *Delaware Tribal Business Committee v Weeks*, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173, reh den 431 U.S. 960, 97 S.Ct. 2688, 53 L. Ed.2d 279 an reh den 431 U.S. 960, 97 S.Ct. 2688, 53 L.Ed.2d 279.

Federal legislation with respect to Indian tribes which classifies and expressly singles out Indian tribes is provided for in Article 1, Section 8, Cl 3 of the United States Constitution, said clause giving Congress the power to regulate commerce with Indian tribes. *United States v Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701.

The parallel of the power vested in the U.S. Congress relating to Indians (Art. 1, Sec. 8, Cl 3) and the power vested in Congress relating to the governing of the territories of the United States (Art. IV, Sec. 3, Cl 2) is apparent.

If the U.S. Congress can enact legislation to restrict the alienation of land allotted to Indians, it can also approve the Covenant which authorizes the establishment of restrictions on the alienation of land in the Commonwealth Constitution so long as the provisions in the Commonwealth Constitution are within the parameters of the terms in the Covenant and the provisions are tied rationally to the fulfillment of Congress' unique obligation toward the Commonwealth.

Consequently, it is held that Article XII of the Commonwealth Constitution can withstand scrutiny under the equal protection provisions of the Fourteenth Amendment of the United States Constitution and Article I, Section 6 of the Commonwealth Constitution and it is declared to be a fair and reasonable result of the direction and authority authorized by the U.S. Congress pursuant

to its Constitutional powers attained in Art. IV, § 3, Cl 2 of the U.S. Constitution.

V. REMEDIES

Turning now to the remedy and equitable considerations of this particular case, it is undisputed that Phillippine Goods, Inc. and Transamerica Corp. Have been paying rent on the subject premises for almost seven years and have placed on the property, at considerable expense, extensive improvements. At the time all of this economic activity occurred the Wabols stood by and did not object. In fact, page 7 of the lease arrangement shows them "approving" the lease. Classic examples of waiver, laches, and estoppel are presented. The plaintiffs answer that they only want to renegotiate the lease, is of no solace to the defendants. If the Wabols claim exorbitant rent based partially or wholly on the defendants own improvements, the defendants wind up with no lease.

The equities strongly favor the defendants and the court will search for an equitable and fair solution under the circumstances of the unique Constitutional provisions of Article XII.

The court is persuaded by defendants' argument to uphold the lease agreement to the maximum legal extent possible. Contracts are to be constructed in a manner so as to uphold their validity and consistent with applicable government laws designed to protect the contracting parties interests. *Pine River Logging & Impr. Co. v. U.S.*, 186 U.S. 279, 22 S.Ct. 920, 46 L.Ed. 1164.

If a contract is capable of a construction which will make it valid legal, effective and enforceable, it will be given that construction. 17 AmJur2d, *Contracts*, § 254.

The closest analogy to this case appears to be those cases dealing with statutory or constitutional provisions restricting the terms of certain leases. 49 AmJur 2d, *Landlord & Tenant*, § 68. There appears to be a split of authority as to whether the prohibited lease is completely void or void only as to the excess. See 17 ALR 2d, pp 570-571. As might be anticipated, the statutory and constitutional provisions limiting the terms of leases are mostly older cases. See, for example, *Tennessee Coal L & R Co. v. Pratt Consol. Coal Co.*, 156 ALA 446, 47 So. 337; *Mass. Nat. Bank v. Shinn*, 163 N.Y. 360, 57 N.E. 611.

It is held that the better and more enlightened rule and one which more effectively addresses the equities involved here is that leases which violate Article XII of the Constitution will be declared void only as to the excess term which violates the constitutional provisions of Article XII.

This does not do violence to the first sentence in § 6 of Article XII which declares that any transaction in violation of the 40 year restriction is void *ab initio*. What is declared is that the lessees in this case had nothing more than a maximum 40 year lease from the outset.[11]

The defendants have filed a cross motion for summary judgment. In view of the court's conclusions on plaintiffs' motion, the matters raised by defendants are resolved. Pursuant to the stipulation and order dated

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[11] If the defendants had been claiming an outright fee simple interest by virtue of a deed, then, of course, a completely different situation would be presented. A lease for a number of years can effectively be declared void as to any excess over the allowable term. A fee simple grant is not so flexible or divisible.

January 17, 1985 all rental is now being deposited into a joint account.

IT IS ORDERED that plaintiffs motion for summary judgment on Count IV is denied save and except to the extent that defendants have a lease on the subject premises for the term of 30 years, ending on January 1, 2009 and *only* an option to extend or renew for an additional 10 years to January 1, 2019.

Dated at Saipan, CM, this 31st day of July, 1985.

/s/ Robert A. Hefner
Robert A. Hefner, Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONCEPCION S. WABOL and ELIAS S. WABOL Plaintiffs-Appellees, v. VICTORINO U. VILLACRUSIS, PHILIPPINE GOODS, INC., and TRANSAMERICA CORP. Defendants-Appellants.	No. 87-1736 DC No. CV-86-9006-AL ORDER (Filed May 29, 1992)

Before: POOLE, WIGGINS and BRUNETTI, Circuit Judges.

The panel has voted to deny the appellees' and appellants' petitions for rehearing and suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Fed. R. App. P 35(b), the petition for rehearing and the suggestion for rehearing en banc is rejected.

CONSTITUTIONAL, COVENANT, AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Article 4, Section 3

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . .

Amendment XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COVENANT PROVISIONS

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Act of Mar. 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note.

Article I
Political Relationship

Section 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands", in political

union with and under the sovereignty of the United States of America.

* * *

Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Island.

* * *

Article V
Applicability of Laws

Section 501.

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article 1, Section 9, Clauses 2, 3 and 8; Article 1, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14,

Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

* * *

Article VIII
Property

* * *

Section 805

Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the

Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency:

(a) will until twenty five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and

(b) may regulate the extent to which a person may own or hold land which is now public land.

NORTHERN MARIANA ISLANDS CONSTITUTION, ARTICLE XII

RESTRICTIONS ON THE ALIENATION OF LAND (Before 1985 Amendment)

Section 1: Alienation of Land. The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2: Acquisition. The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee does not hold the permanent or long-term interest in real property for more than five years.

Section 3: Permanent and Long-Term Interests in Real Property. The term permanent and long-term interests in

real property used in section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.

Section 4: Persons of Northern Marianas Descent. A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations. A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors at least fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by section 4.

Section 6: Enforcement. Any transaction made in violation of section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the effective

date of this Constitution shall be forfeited to the government.

RESTRICTIONS ON THE ALIENATION OF LAND (After 1985 Amendment)

* * *

Section 2: Acquisition. The term acquisition used in Section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section if the owner dies without issue or with issue not eligible to own land in the Northern Mariana Islands. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee is a full service bank, Federal Agency or Governmental entity of the Commonwealth and does not hold the permanent or long-term interest in real property for more than ten years beyond the term of the mortgage.

Section 3: Permanent and Long-Term Interests in Real Property. The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building. Any interests acquired above the first floor of a condominium building is restricted to private lands. Any land transaction in violation of this provision shall be void. This amendment does not apply to existing leasehold agreements.

* * *

Section 5: Corporations. A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors one-hundred percent of whom are persons of Northern Marianas descent and has voting shares (i.e. common or preferred) one-hundred percent of which are owned by persons of Northern Marianas descent as defined by section 4. Minors, as defined by applicable laws of the Commonwealth, may not be eligible to become directors of a corporation. No trusts or voting by proxy by persons not of Northern Marianas descent may be permitted. Beneficial title may not be severed from legal title.

Section 6: Enforcement. Any transaction made in violation of section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the effective date of this Constitution shall be immediately forfeited without right of redemption to the government of the Commonwealth of the Northern Mariana Islands. The Registrar of Corporations shall issue regulations to ensure compliance and the legislature may enact enforcement laws and procedures.

Northern Mariana Islands
Pub. L. No. 6-25, §3109

* * *

(b) Pending Appeals. The [NMI] Supreme Court has appellate jurisdiction over all appeals which have been

taken from a judgment, order or decision of the Commonwealth Trial Court, and which are pending before the appellate division of the District Court of the Northern Mariana Islands, or before the United States Court of Appeals for the Ninth Circuit, or before the Supreme Court of the United States.

* * *

Supreme Court
FILED
OCT 1 1992
OFFICE OF THE CLERK

No. 92-255

In The

Supreme Court of the United States

October Term, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,

Petitioners,

vs.

CONCEPCION S. WABOL and ELIAS S. WABOL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

David R. Nevitt
Donn Dimichele*
Carlsmith Ball Wichman Murray Case Mukai & Ichiki
555 South Flower Street
Twenty-Fifth Floor
Los Angeles, California 90071
(213) 955-1200

Counsel for Amicus Curiae Hotel Nikko Saipan, Inc.

*Counsel of Record

October 1, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae Hotel Nikko Saipan, Inc. (Amicus) is a subsidiary corporation of Japan Development Corporation, a subsidiary of Japan Air Lines. Amicus owns and operates a 320-room resort hotel and a shopping mall complex on the island of Saipan in the Commonwealth of the Northern Mariana Islands (CNMI). Because Amicus is not legally permitted under Article XII of the CNMI Constitution (Article XII) to own real property in the CNMI, the hotel and mall are on leased land. Article XII also limits Amicus' leasehold interests to no more than fifty-five years. Amicus thus has a substantial economic investment over which, due to the limitations imposed by Article XII, it has only limited control and which it has no assurance of being permitted to maintain. Currently, litigation is pending against Amicus in the CNMI courts under Article XII, which seeks to divest Amicus of its right to operate its hotel.[1]

SUMMARY OF ARGUMENT

The Court of Appeals in the present case concluded that Congress validly insulated Article XII, which limits land ownership to persons of Northern Marianas descent, from constitutional scrutiny. The court relied on the doctrine of "territorial incorporation," under which only "fundamental" constitutional rights need be afforded

[1] Pursuant to Rule 37.2 of the rules of this Court, Amicus has obtained and submitted with this brief the written consent of all parties to the filing of the brief.

protection in territories which are not "incorporated" into the United States. *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990); Pet. App. 21. The court concluded that the right to equal access to property in the CNMI was not such a right, because it would be "impractical and anomalous" to recognize that right in view of the "local culture and values" in the CNMI. 958 F.2d at 1461-62; Pet. App. 24-25.

This Court should grant certiorari to consider whether the doctrine of territorial incorporation retains its vitality today and whether it is appropriate to apply the doctrine to the CNMI. The Court also should consider whether the criterion applied by the Court of Appeals in determining whether the right to freedom from racial discrimination should be recognized in the CNMI – whether it would be "impractical and anomalous" to recognize the right – is a legally proper standard.

ARGUMENT

1. The Court Should Grant Certiorari To Consider The Current Vitality Of The Doctrine Of Territorial Incorporation, And Its Applicability To The CNMI.

The doctrine of territorial incorporation was first articulated in a series of decisions in 1901 now referred to as the "*Insular Cases*."[2] *Downes v. Bidwell*, 182 U.S. 244

[2] *See, e.g., Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901). Precisely which decisions the term "*Insular Cases*" comprises is not com-

(1901), is considered the most significant of the decisions. *Examining Board v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976). The Court, per Justice Brown with four Justices dissenting, held that the imposition by Congress of special duties on goods imported from Puerto Rico did not violate Article I, Section 8 of the Constitution, which requires all duties, imposts and excises to be "uniform throughout the United States." *Downes, supra*, at 287. Justice White, in a concurring opinion joined by two other Justices, reasoned that the Constitution would only apply in full force to a territory which had been "incorporated into the United States." Because the treaty of cession by which the United States acquired Puerto Rico from Spain did not provide for incorporation of the new territory into the United States, the Constitution did not apply in full force to Puerto Rico. *Id.* at 340, 342.

In subsequent decisions, the Court held that various constitutional provisions respecting criminal procedure were inapplicable to "unincorporated" territories. See, *e.g., Hawaii v. Mankichi*, 190 U.S. 197 (1903) (rights to indictment by grand jury and to jury trial inapplicable in Hawaii); *Dorr v. United States*, 195 U.S. 138 (1904) (right to jury trial inapplicable in Philippines); *Ocampo v. United States*, 234 U.S. 91 (1914) (right to indictment by grand

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pletely clear. Other cases decided at the same time as the four cited above are sometimes included, as are later decisions in the early part of the twentieth century dealing with the application of the Constitution to the "insular" territories of Puerto Rico, Hawaii and the Philippines. *See, e.g., Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).

jury inapplicable in Philippines); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) (right to jury trial inapplicable in Puerto Rico). The incorporation analysis set forth in Justice White's concurrence in *Downes* was adopted by a majority of the Court in *Dorr*, and by a unanimous Court in *Balzac*. See generally *Torres v. Com. of Puerto Rico*, 442 U.S. 465, 469 (1979); *Flores de Otero, supra*, 426 U.S. at 599 n.30.

The justification for the doctrine of incorporation, as set forth in *Downes*, "was openly racist." Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 22 (1989). Justice White in *Downes* expressed concern that immediate incorporation of an "uncivilized race" into the United States might cause "the immediate bestowal of citizenship on those absolutely unfit to receive it." 182 U.S. at 306. In *Dorr*, the Court remarked on the impossibility of establishing a right to trial by jury in "territory peopled by savages." 195 U.S. at 148. Indeed, at the time the *Insular Cases* were decided, "the dominant consideration in favor of the plenary power of Congress was the fear that, if the newly acquired territories were held to be part of the United States, people of alien race and civilization would become citizens and have the right to claim jury trials and the other safeguards of personal liberties guaranteed by the first ten Amendments to the Constitution." Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 Colum. L. Rev. 823, 827 (1926).

Thus, the justification for the doctrine of incorporation was that it was necessary to allow Congress, for a limited time, to govern newly acquired territories without all of the constraints of the Constitution. This would

permit the inhabitants to become sufficiently "civilized" for full application of the Constitution to be practical. "The rationale for the rule has been that it allows 'semi-civilized' societies to become civilized before adopting our legal system . . . . " Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?* 9 Denver J. Int'l Law & Policy 35, 43 (1980). In *Downes*, Justice Brown observed, "If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible. . . . " 182 U.S. at 286; *see also Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (the *Insular Cases* "involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions"). Similarly, there was concern that the geographical isolation of the "insular" territories would retard their assimilation into the United States. *See Balzac, supra*, at 311 (Court should not lightly infer an intention to incorporate into the United States "these distant ocean communities of a different origin and language from those of our continental people").

Finally, the incorporation doctrine's underlying premise – that Congress might find it necessary or desirable to acquire territory without affording the inhabitants full constitutional rights – reflected the imperialist model which pervaded the foreign policy of the United States and other developed nations at the turn of the century. As Justice Brown said in *Downes*, "[a] false step at this time

might be fatal to the development of what Chief Justice Marshall called the American Empire." 182 U.S. at 286.

In recent years, various members of the Court have questioned the vitality of the incorporation doctrine. In holding that spouses of American servicemen stationed abroad were entitled to jury trials, a plurality of the Court stated in 1957, "it is our judgment that neither the [Insular] cases nor their reasoning should be given any further expansion." *Reid v. Covert, supra,* 354 U.S. at 14. Concurring in a 1979 decision, four Justices, citing *Reid, supra,* said, "Whatever the validity of the [Insular] cases . . . in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment – or any other provision of the Bill of Rights – to the Commonwealth of Puerto Rico in the 1970's." *Torres v. Com. of Puerto Rico, supra,* 442 U.S. at 475-76. Justice Marshall observed in 1980 that in light of later decisions of the Court, "the present validity of those [Insular] decisions is questionable." *Harris v. Rosario,* 446 U.S. 651, 653 (1980) (Marshall, J., dissenting).

Most recently the Court, without discussing their current vitality, referred to the *Insular Cases* in holding that the Fourth Amendment did not apply to a search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country. *United States v. Verdugo-Urquidez,* 494 U.S. 259, 274-75 (1990).[3]

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[3] The *Insular Cases* were not directly apposite in *Verdugo-Urquidez,* since the case did not involve the applicability of a constitutional provision to a United States territory. The Court reasoned that if, under the *Insular Cases,* not all constitutional

One Justice, concurring, noted that the cases had not been overruled, *id.* at 277 (Kennedy, J., concurring), while two more, in dissent, stated that they "were limited to their facts long ago." *Id.* at 291 (Brennan, J. and Marshall, J., dissenting, citing *Reid, supra*).

Commentators outside the Court have strenuously questioned the vitality of the incorporation doctrine in view of current conditions. One respected commentator has stated that the doctrine's values and premises "have been overruled by time" and that "the time has come to re-examine the present expansionist views of the Territorial Clause and federal power as set forth in the *Insular Cases*." Leibowitz, *supra*, at 19, 26. The same authority states that modern territorial views of the *Insular Cases* regard the decisions as a "major disaster" and that the views of the dissenting Justices, if adopted, "would have saved the nation and the territories considerable pain." *Id.* at 21 n.68, 24. Another commentator, writing with specific reference to the CNMI, states that "with modern transportation, communication, and technology, the territories cannot be considered far away and isolated as they no doubt were in 1901" and that the justifications for the incorporation doctrine "are not valid today where all the territories have television, direct communications with the States, automobiles, jet airplane transportation, and when many of the inhabitants have high school and college education, and where virtually all speak and understand English." Branch, *supra*, at 37 n.15, 66.

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provisions were applicable to unincorporated territories, it was even less arguable that they extended to aliens in foreign nations. 494 U.S. at 268.

If it is questionable whether the doctrine of incorporation remains valid at all, its applicability to the CNMI is even less justifiable. As discussed previously, the principal purpose of the doctrine was to permit the annexation of outlying territories without immediately conferring American citizenship and constitutional rights on persons who were not thought to be ready to enjoy them. Whether or not that purpose was justified with respect to territories acquired by cession at the turn of the century, it hardly applies to the CNMI. The CNMI was created with the express purpose that it would exist in "political union" with the United States. In 1976, the United States and the CNMI entered into a Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant), Pub.L. No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1681 note. Section 101 of the Covenant provided that the CNMI would exist "in political union with and under the sovereignty of the United States of America." Section 301 provided that virtually all of the existing population, as well as anyone born in the CNMI thereafter, would be United States citizens. Section 501 provided that certain provisions of the United States Constitution, including the Fourteenth Amendment guarantees of equal protection and due process, would apply to the CNMI, but exempted from their application the land alienation restrictions embodied in Article XII.

Under these circumstances, there can be little justification under the incorporation doctrine for declining to hold the Equal Protection Clause fully applicable to the CNMI. None of the concerns underlying the incorporation doctrine pertains to the CNMI. The CNMI having

elected to enter into a political union with the United States, and its people having elected to become United States citizens, it hardly can be argued that its people are too alien, or its customs too different, to permit the application of the constitutional provisions which apply to the rest of the nation. Rather, "once a society, such as the Northern Marianas, *freely* chooses to become a 'part' of the United States, and its inhabitants *freely* choose to become citizens of the United States, then the application of the Constitution should not be the subject of negotiation. In such a situation, deviations from constitutional standards cannot be justified under the guise of a 'different cultural setting'. . . . " Branch, *supra*, at 38-39 (emphasis in original).

2. The Court Should Grant Certiorari To Consider Whether The Incorporation Doctrine Authorizes The Abrogation Of The Right To Equal Protection On The Ground That Recognition Of The Right Would Be Impractical And Anomalous.

If Congress today retains the power to apply constitutional guarantees to unincorporated territories on a selective basis, there still remains the question whether it acted properly in exempting the CNMI from the prohibition against racial discrimination. The *Insular Cases* and later decisions recognize that certain constitutional guarantees must be respected even in unincorporated territories. In *Downes, supra*, Justice Brown stated that, irrespective of the question of incorporation, Congress in legislating for the territories "would be subject to those fundamental limitations in favor of personal rights which

are formulated in the Constitution and its amendments. . . . " 182 U.S. at 268, quoting from *Church of Jesus Christ of L.D.S. v. United States*, 136 U.S. 1, 44 (1890); *accord, Dorr v. United States, supra*, 195 U.S. at 146. He also suggested, in dictum, a distinction between "natural rights" and "artificial or remedial rights." Natural rights included freedom of religion, speech and the press; personal liberty and individual property; free access to courts; "due process of law" and "equal protection of the laws"; freedom from unreasonable searches and seizures and cruel and unusual punishment; and "such other immunities as are indispensable to a free government." Artificial or remedial rights included the rights to citizenship, suffrage, and "the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence." 182 U.S. at 282-83.

Justice White in the same case said that even in unincorporated territories, Congress would be bound by those "principles which are the basis of all free government." *Id.* at 290-91; *accord, Dorr, supra*, at 147. He described these generally as "general prohibitions in the Constitution in favor of the liberty and property of the citizen," and suggested that among them would be freedom of religion and press, and the guarantee against cruel and unusual punishment. 182 U.S. at 294, 298. Shortly thereafter, the Court suggested in dictum that "most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation." *Hawaii v. Mankichi, supra*, 190 U.S. at 217-18; *accord, Dorr, supra*, at 144. Later, the Court observed that "[t]he guaranties of certain fundamental rights declared in the Constitution, as for

instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico. . . . " *Balzac v. People of Porto Rico, supra,* 258 U.S. at 312-13.

In *Flores de Otero, supra,* the Court squarely addressed the question whether the constitutional prohibition against discrimination on the basis of alienage applied to Puerto Rico. Holding that Puerto Rico could not restrict engineering licenses to United States citizens, the Court said, "It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico." 426 U.S. at 600. In other decisions, this Court and lower courts have held numerous other constitutional protections to be applicable in "unincorporated" territories. *See, e.g., Torres v. Com. of Puerto Rico, supra,* 442 U.S. at 471 (Fourth Amendment applies to Puerto Rico, either directly or by operation of Fourteenth Amendment); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 668-69 n.5, 680 (1974) (Due Process Clause of either Fifth or Fourteenth Amendment and, apparently, Just Compensation Clause, apply to Puerto Rico); *Juda v. United States,* 6 Cl. Ct. 441, 458 (1984) (Just Compensation Clause of Fifth Amendment applies to Marshall Islands); *Feliciano v. Barcelo,* 497 F. Supp. 14, 33 (D.P.R. 1979) (Eighth Amendment protection available to Puerto Rico residents through action under 42 U.S.C. § 1983).

Against this backdrop, the Court of Appeals in the present case nonetheless held that Article XII was exempt from equal protection scrutiny. The court stated that even

though, under *Flores de Otero*, residents of unincorporated territories are entitled to equal protection, "[i]t is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection." 958 F.2d at 1460 n.19; Pet. App. 23 n.19. Once such a "specific right of equality" is identified, whether the right is "fundamental" for purposes of the incorporation doctrine, so that it must be recognized in unincorporated territories, depends on whether it would be "impractical and anomalous" to recognize it. 958 F.2d at 1461; Pet. App. 24. Concluding that it would be impractical and anomalous to require the CNMI to permit land ownership on a racially equal basis, the court held that "the right of equal access to long-term interests in Commonwealth real estate" was not "fundamental." 958 F.2d at 1460, 1462; Pet. App. 21, 27.

The Court of Appeals' analysis is a dramatic departure from precedent in at least two respects. First, there is no support in the decisions of this Court for the proposition that where the general principle of equal protection applies, there may be "specific right[s] of equality" which do not apply. The Court of Appeals compared this case to decisions involving the application of procedural due process, noting that even where the right to due process exists, a specific component of it, such as the right to a jury trial, may not. 958 F.2d at 1460 n.19; Pet. App. 23 n.19. Procedural due process, however, "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord, Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). Not all situations demand

"the full panoply of rights." *Morrissey, supra,* at 480. In contrast, "[t]he guarantee of equal protection under the Fifth Amendment *is not a source of substantive rights or liberties,* but rather *a right to be free from invidious discrimination* in statutory classifications and other governmental activity." *Harris v. McRae,* 448 U.S. 297, 322 (1980) (footnote omitted; emphasis added). While it may be appropriate in applying procedural due process to consider whether particular rights are mandated, a right to freedom from discrimination either exists or does not. *Flores de Otero* and the other authorities cited above leave no doubt that the right exists even in "unincorporated" territories.

Second, there is no support in the *Insular Cases* or subsequent decisions for the Court of Appeals' conclusion that a constitutional right need not be recognized in an unincorporated territory if it would be "impractical and anomalous" to recognize it. In so concluding, the Court of Appeals relied exclusively on cases involving the right to a jury trial. The court first cited one of its own decisions, *Commonwealth of Northern Mariana Islands v. Atalig,* 723 F.2d 682 (9th Cir.), *cert. denied,* 467 U.S. 1244 (1984), in which it had held that the right to a jury trial did not apply in the CNMI. 958 F.2d at 1460-61; Pet. App. 22-24. It then adopted the "impractical and anomalous" standard from *King v. Morton,* 520 F.2d 1140 (D.C. Cir. 1975). The court in *King,* in determining whether there was a right to a jury trial in American Samoa, stated the relevant inquiry as whether in the territory "circumstances are such that trial by jury would be impractical and anomalous." *Id.* at 1147 (citations omitted). The court

supported its statement by citing to Justice Harlan's concurring opinion in *Reid v. Covert, supra,* 354 U.S. at 75 (Harlan, J., concurring), another decision involving the right to a jury trial.

The Court of Appeals' reliance on these authorities was entirely misplaced. The *Insular Cases* recognized that the right to a jury trial was merely an "institution of Anglo-Saxon origin," *Balzac, supra,* 258 U.S. at 310, and not one of those rights which are "the basis of all free government." *Dorr v. United States, supra,* 195 U.S. at 147-48. Although this Court has held a jury trial to be fundamental to the *American* scheme of justice, it has also recognized that it is "easy to imagine" a criminal process which is fair and equitable without juries. *Duncan v. Louisiana,* 391 U.S. 145, 149-50 n.14 (1968).[4] Thus, the right to a jury trial by definition is not basic to a free government and need not be recognized in an unincorporated territory if it would be impractical to do so.

In contrast, it is not easy, or even possible, to imagine a free government in which racial discrimination in the ownership of land is tolerated, as it is in the CNMI, where two classes of United States citizens exist – those who can own property, and those who cannot. Freedom from racial discrimination is not "peculiar to Anglo-

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[4] Indeed, as noted in the *Insular Cases,* many of the inhabitants of the new territories "had a system of jurisprudence founded upon the civil law." *Dorr, supra,* 195 U.S. at 145. "The extension of all constitutional rights, including such common law procedures as trial by jury, was considered inappropriate for people who had lived under the civil law traditions for centuries." *Water Isle Hotel v. Kon Tiki St. Thomas, Inc.,* 795 F.2d 325, 327 (3d Cir. 1986).

Saxon jurisprudence," *Downes, supra*, 182 U.S. at 283, but is accepted by every modern civilized society as a fundamental right. There is, or should be, no occasion to ask whether recognition of the right is "impractical and anomalous" as the Court of Appeals did in the present case. Neither the *Insular Cases* nor any of the later decisions of this Court sanction such an inquiry. Rather, they demonstrate that when fundamental substantive constitutional protections such as due process and equal protection are involved, recognition of those protections is not subject to considerations of expediency or local convenience.

The Court of Appeals' endorsement of the "impractical and anomalous" standard in the context of equal protection sets a dangerous precedent. It permits a territorial government, and that of the United States, to legitimize the abrogation of a constitutional right simply by stating that it is politically necessary or important. That is, in fact, precisely what occurred in the present case. The CNMI and the United States provided in the Covenant that the land alienation restrictions were "fundamental" to the Covenant and therefore could not be modified without the consent of both parties. Covenant § 105. The Court of Appeals then cited this fact in support of its conclusion that it would be "impractical and anomalous" to require the CNMI to comply with the Equal Protection Clause, reasoning that it might disrupt the political union between the CNMI and the United States. 958 U.S. at 1461-62; Pet. App. 25-26. The same sort of circular analysis could be used to justify the abrogation of virtually any constitutional right.

If, in fact, the recognition of racial equality in the ownership of land in the CNMI would be as devastating to the indigenous culture as the Court of Appeals suggested,[5] there is no reason not to require the CNMI to demonstrate that fact by establishing the existence of a compelling state interest under an equal protection analysis. Application of that standard would also have the salutary effect of requiring the CNMI to employ the least restrictive means necessary to further its legitimate interest, a requirement the Court of Appeals held was inapplicable under the "impractical and anomalous" test. 958 F.2d at 1462; Pet. App. 26.

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[5] The opinion of the Court of Appeals leaves the impression that the CNMI remains a primitive territory populated by cloistered, unsophisticated indigenous people. In fact, dramatic economic development has occurred in the CNMI since the Covenant was executed. From 1978 to 1988, the CNMI's gross economic product increased ten-fold, from about $45 million to about $445 million. Commonwealth Development Commission, *CNMI Overall Economic Development Strategy* 6 (1989). Due to the CNMI's proximity to Japan and the Philippines, tourism has flourished. From 1980 to 1990, the number of available hotel rooms tripled, from 740 to 2,651. CNMI Office of Planning & Budget, *Economic Development Strategy* 48 (1990); *Marianas Visitor Bureau Annual Report* 7 (1990).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID R. NEVITT
DONN DIMICHELE*
CARLSMITH BALL WICHMAN MURRAY
CASE MUKAI & ICHIKI

October 1, 1992

Counsel for Amicus Curiae
Hotel Nikko Saipan, Inc.

*Counsel of Record

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(3)

In The
Supreme Court of the United States
October Term, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION and VICTORINO U. VILLACRUSIS,

Petitioners,

v.

CONCEPCION S. WABOL and ELIAS S. WABOL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

THEODORE R. MITCHELL
Counsel of Record
for Respondents
Third Floor, Nauru Building
Post Office Box 2020
Saipan, MP 96950
Telephone: 670/234-9800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the legislature of the Commonwealth of the Northern Mariana Islands had authority, under § 402(c) of the COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, P.L. 94-241, 90 Stat. 263, to withdraw appellate jurisdiction of this case from the Ninth Circuit.

2. Whether the limitation of the right of land ownership to persons of Northern Marianas descent, which is mandated by the Covenant, violates the Fifth Amendment of the United States Constitution.

3. Whether, if the Commonwealth land ownership limitations are violative of the United States Constitution, the Court should nonetheless allow them to stand because it would be impracticable and anomalous to invalidate those limitations under the circumstances of this case.

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REFERENCE TO OFFICIAL REPORTS

The decision of the Ninth Circuit is reported as *Wabol v. Villacrusis,* 958 F.2d 1450, 1455-58 (9th Cir. 1992).

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review this case on the merits because the Court of Appeals was divested of jurisdiction on May 2, 1989, by the Commonwealth Judicial Reorganization Act. The decision of the Court of Appeals is wrong on the jurisdictional issue. Pet.App. 11-17.

This case is here because the arrangement between the Commonwealth judiciary and the federal appellate courts is similar to that which existed between the state and federal courts in the transition of Alaska from territorial to statehood status. *Metlakatla Indian Community v. Egan,* 363 U.S. 555, 558-559 (1960) (interim United States district court "creature of two sovereigns" "vested with judicial power of the State" of Alaska to decide state cases; "termination of the existence" of the court governed by federal law, but termination of jurisdiction governed by state law). *See,* Br.Opp.App. 109a-119a and 135a-140a.

By virtue of § 402(c) of the Covenant, the federal appellate courts, the appellate division of the District Court, the Ninth Circuit and this Court, are federal judicial institutions vested with and exercising Commonwealth judicial power.

The Commonwealth was allowed to invest the federal appellate courts with jurisdiction to hear Commonwealth appeals for as long as it elected to do so. Br.Opp.App. 103a

"Of course it does not matter that these cases ha[ve] gone to a higher court. When the root is cut, the branches fall." *Smallwood v. Gallardo,* 275 U.S. 56, 61 (1927) (Holmes, J.). Thus, it is the Commonwealth Legislature which has the power to determine the fate of *all* Commonwealth appeals, new and old alike. *See Bruner v. United States,* 343 U.S. 112 and 117 n. 8 (1952); *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869); *De La Rama Steamship Company, Inc. v. United States,* 344 U.S. 386 (1953); *Hallowell v. Commons,* 239 U.S. 506 (1916); and *De Rodulfa v. United States,* 461 F.2d 1240, 1251 (D.C.Cir. 1972).

Contrary to the holding of the Court of Appeals, the Congress lacks authority under Article III to confer power on the federal appellate courts to hear Commonwealth appeals. *Cf. Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970).

STATEMENT OF THE CASE

Statement of Facts

When the lease at issue in this aged case was executed by Philippine Goods, Inc., Article XII, § 5 of the Commonwealth Constitution prescribed the following plain and simple requirements: (1) 51% of the "voting shares" of the company must be owned by persons of

Northern Marianas descent, (2) 51% of the directors must be persons of Northern Marianas descent, and (3) the lease term could not exceed 40 years, "including renewal rights." Pet.App. 74-75.

Philippine Goods missed the ownership minimum by 1%. Pet.App. 51. The company had three directors, Maria N. Manalo, Victorino U. Villacrusis and Leonard C. Villacrusis, two of whom were ineligible. Pet.App. 51. The board missed the minimum by 1 member. Pet.App. 51.

While the Northern Marianas ownership and control of the company fell short, the term of the lease was too long. The lease included a 30 year initial term, plus a 20 year option, for a total of 50 years. Pet.App. 51.[1]

SUMMARY OF THE ARGUMENT

This is a case arising under the international law of the United States, including the Trusteeship Agreement, the Covenant, and the doctrine of the *Insular Cases*. It must be seen in this light in order to correctly analyze the constitutional issues presented.

The mandate of § 805 of the Covenant that the Commonwealth must restrict ownership of Commonwealth land to persons of Northern Marianas descent for 25 years following termination of the Trusteeship Agreement is not based on a racial classification.

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[1] This information is also found at page 4 of petitioners' brief in somewhat less graphic form. In a sense, the only reason this case is here is because the management of the company lacked facility in elementary arithmetic.

In rendering the decision below, the Ninth Circuit properly and correctly applied the doctrine of the *Insular Cases* rather than a due process and equal protection analysis.

Article XII of the Commonwealth Constitution appropriately implements the land ownership restriction of § 805 of the Covenant. It is neither too restrictive nor too relaxed and therefore cannot be challenged as violative of § 805.

The validity of Covenant § 805 must be judged as of the time it was agreed to by the parties, in the light of the circumstances then existing. Its continuing validity does not depend on an alleged change in the social and economic conditions which formed its original basis.

ARGUMENT

I.

This Case Arises Under Unusual International Circumstances

The Ninth Circuit was right when it noted that: "A proper understanding of the problem, and our resolution, requires a brief digression into the relationship between the Commonwealth and the United States." Pet.App. 18. The Ninth Circuit judge who wrote the seminal decision in *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984) began with the same premise. *Atalig*, 723 F.2d at 684 ("[t]he resolution of issues [involving the Covenant] requires an understanding of the unique political relationship between the [Northern Mariana Islands] and the United States." The District of Columbia Circuit

was moved to make a similar observation in a case involving pre-Covenant issues arising under the Trusteeship Agreement: "If one fails to appreciate the true characteristics of this unique relationship for purposes of this case, it is easy to get lost in the intricacies of standard administrative law trying to pigeonhole or label this entity called 'Micronesia.'" *Gale v. Andrus*, 643 F.2d 826, 830 (D.C.Cir. 1980).[2]

In sum, the present-day relationship between the Commonwealth and the United States, based on the Covenant, began with the victory of the allied forces in the Pacific over the Japanese in the fall of 1944 in the battle of Saipan. Three years later the United States became the administering authority under a United Nations trusteeship agreement. In 1975, after three years of negotiations, the Northern Mariana Islands and the United States executed the Covenant.

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[2] That relationship is described in *Atalig*, 723 F.2d at 684-86; and *Gale*, 643 F.2d at 828-30. For the Ninth Circuit's description of this same background in the decision at issue here, see Pet.App. 18-20. *See, also,* Clark, *Self-Determination and Free-Association – Should the United Nations Terminate The Pacific Islands Trust?*, 21 HARV.INT'L L.J. 1(1980) [hereinafter Clark]; A. H. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L. L.J. 19 (1980) [hereinafter Leibowitz], Willens & Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373 (1977) [hereinafter Willens & Siemer]; and D. MCHENRY, MICRONESIA: TRUST BETRAYED (1975) [hereinafter MCHENRY]. For a legal and historical study of United States relations with all of its territories, as well as a discussion of the Northern Marianas, see A. H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989) [hereinafter DEFINING STATUS].

The Covenant negotiations were conducted by the President of the United States, acting through his personal representative with the rank of ambassador, F. Haydn Williams. McHenry at 103.[3] The Northern Marianas was represented by the Marianas Political Status Commission, a creature of the Marianas local legislature. Willens & Siemer at 1381 & n. 32; and Leibowitz 22 n. 8.[4]

Following conclusion of the negotiations and execution of the Covenant by the parties on February 15, 1975, the people of the Northern Marianas approved the Covenant in a plebiscite, hearings were held before the House Committee on Interior and Insular Affairs, the Senate Committee on Interior and Insular Affairs, the Senate Foreign Relations Committee and the Senate Armed Services Committee, and both houses of the United States Congress approved the Covenant with a joint resolution which was adopted March 24, 1976. Willens & Siemer at 1381 & nn. 33 & 34.[5] The result is

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[3] Under the terms of his appointment Ambassador Williams had the capacity to conclude an "international agreement" with the Northern Mariana Islands. Restatement of the Foreign Relations Law of the United States 3d, § 311.

[4] The Northern Marianas was still part of the Trust Territory during this period. It seems reasonable to conceive of the Marianas District Legislature as having a foreign affairs capacity comparable to the Continental Congress, prior to the Declaration of Independence, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, (1936), and the Marianas Political Status Commission as the executive organ to carry out the negotiations.

[5] The congressional deliberations were lengthy, probing and comprehensive. *See* S. Rep. No. 364, 94th Cong., 1st Sess. (1975); S. Rep. No. 433, 94th Cong., 1st Sess. (1975); S. Rep.

characterized by Willens & Siemer as "the preconstitutional act by which the people of the Northern Marianas exercised their right of self-determination and became a part of the United States." Willens & Siemer at 1381. *See* Clark at 75-78.[6]

To borrow a phrase from an analogous context, it would appear that both the President and the Congress "employed an amalgam of its specifically delegated powers," *Fullilove v. Klutznick,* 448 U.S. 448, 473 (1980), to negotiate, execute and approve the Covenant.

The President employed both his appointments power and treaty-making authority under Article II, § 2, cl. 2 of the Constitution.[7] The Congress employed its authority to provide for the "common Defence," Article I, § 8, cl. 1; the Senate exercised its power to give advice and consent on treaties, Article II, § 2, cl. 2. And,

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No. 596, 94th Cong. 2d Sess. (1976); *Hearings on S.J. Res. 107 Before the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975); Hearings on H.J. Res. 549 Before the Subcomm. on General Legislation of the Senate Comm. on Armed Services, 94th Cong., 1st Sess. (1976); Hearings on H.J. Res. 549 Before the Senate Comm. on Foreign Relations, 94th Cong., 1st Sess. (1976);* and *Hearings Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. (Serial No. 94-13) (1975). *See also,* DEFINING STATUS 530-36.

[6] Thus, the Northern Marianas became part of the United States of its own free will, freely expressed, and not as an acquired possession like Guam, *Ngiraingas v. Sanchez,* 495 U.S. ___, 110 S.Ct. 1737, 1740 (1990).

[7] Leibowitz notes that the § 805 land ownership restrictions "may be legally sustainable as a result of the treaty-making powers of the United States." DEFINING STATUS at 103-04.

the Congress as a whole employed its power under the Territorial Clause, Article IV, § 3, cl. 2.

When the parties came to the bargaining table, the United States was a "trustee," *People of Saipan v. United States Dep't of Interior,* 502 F.2d 90, 96-97 (9th Cir. 1974), *cert. denied,* 420 U.S. 1003 (1975), and the people of the Northern Mariana Islands were its beneficiaries. *Cf. Gale,* 642 F.2d at 830. This was a relationship akin to that between the United States and the American Indians. *Morton v. Mancari,* 417 U.S. 535, 550 (1974) (there is a "unique legal relationship between the Federal Government and tribal Indians."); and Willens & Siemer at 1455-56.

The shared objective of the negotiations was the accomplishment of two related but distinct goals: One, to work out the terms on which the Trusteeship Agreement would be terminated by mutual consent of the trustee and beneficiary (subject to concurrence of the United Nations) and, Two, to frame the terms of a new, permanent relationship between the United States and the Northern Mariana Islands. Leibowitz at 19-22; and Willens & Siemer at 1374-84. This joint enterprise had the parties engaged in foreign relations with one another. On May 28, 1986, the Trusteeship Council of the United Nations reviewed the result and decided that the United States had "discharged its obligations . . . under the Trusteeship Agreement," and on Nov. 3, 1986, the Trusteeship was terminated. Proclamation No. 5564, 51 Fed.Reg. 40,399 (Nov. 3, 1986).

Once the negotiations were completed and the people of the Northern Marianas took steps to approve the agreement, they were exercising their sovereign rights

of self-determination under international law. Willens & Siemer at 1379-80; and Clark at 75-78. Once they approved the Covenant, both they and the United States were bound, forever, by its terms. Covenant, Preamble; and Clark at 75 n. 399.

The method employed was "a unique method of expanding the Union." Leibowitz at 22. And, it was "the first United States acquisition of a populated territory in almost 50 years." DEFINING STATUS at 520. In another first: "This was the first time in the history of the United States territorial affairs that the federal government agreed to an unambiguous limitation on its power." Leibowitz at 79.

In its discussion of the application of the *Insular Cases* doctrine to this case, the Ninth Circuit correctly referred to the Covenant as part of the "international obligations" of the United States. Pet.App. 27. The House Interior Committee referred to the Covenant as an "agreement between the United States and the territory which it regards as a *treaty-like* obligation on the part of both." H. Rep. No. 174, 98th Cong., 1st Sess. at 5 (1983) (emphasis added). It is at least the functional equivalent of an "international agreement" as defined by international law. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 3D, § 301(1).

Given its form, content, function and purpose, the Covenant should be treated as a generic international agreement – as the equivalent of a treaty – for purposes of judicial review and when the Court is called upon to pass on its constitutionality, it should give due deference to the decisions of the Executive and the Congress. *Factor v. Laubenheimer,* 290 U.S. 276, 293-95 (1980).

And, because of the extensive and thoughtful treatment given all of the issues raised by the Covenant, including § 805, this Court can readily ascertain the purposes of those who made it and approved it.[8]

Indeed, the extensive involvement of both political branches of government in the negotiation, review and the approval of the Covenant qualifies the instrument for the top tier of Justice Jackson's famous hierarchy of the legitimacy of executive actions. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-36 (1952) (concurring opinion) ("When a President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, it may be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.")[9]

Since the land ownership provision of § 805 is singled out for special treatment in both § 105 and § 501(b) of the Covenant, there can be no doubt that the parties to the agreement intended it to be a material part of the bargain. Thus, a judicial decision striking down § 805 would put the United States in material breach of the

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[8] *See* references to hearings and reports collected at n. 4, *supra.*

[9] Put in Justice Jackson's terms, Philippine Goods contends that "the Federal Government as an undivided whole lacks power" to agree to the land ownership restrictions required by § 805 of the Covenant.

Covenant. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 3D § 112 (Supreme Court interpretation binding) and § 335 (definition of material breach).[10]

It is against this background that Philippine Goods asks this Court to disturb a vital provision of the Covenant, with the possible consequence of destroying the entire relationship which was founded upon it seventeen years ago.

II.

THE LAND OWNERSHIP LIMITATIONS WHICH ARE MANDATED BY § 805 OF THE COVENANT ARE NOT BASED ON RACIAL CLASSIFICATIONS

Philippine Goods characterizes the discrimination in land ownership rights which is mandated by § 805 of the Covenant as racially based and then insists that an equal protection, strict judicial scrutiny analysis applies to the validity of § 805 itself. Pet. 9-11.

To be sure, the Ninth Circuit court, twice, uses the expression "race-based" in reference to the land ownership restrictions, Pet.App. 1 and 9, but without discussion and without expressly so holding. At the same time, the court made a detailed and close analysis of the reasons for both § 805 and Article XII, taken from

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[10] If such a breach should occur and if the Northern Marianas elected to take full advantage of it, it is unclear whether the status of the islands would revert to the Trusteeship, or some other. What is clear is that the petitioners and all other persons not of "Northern Marianas descent" would have no appeal to the United States Constitution. It would no longer apply, at all.

the negotiating history of the Covenant and the constitutional history of Article XII. Pet.App. 24-27. All of the court's discussion was expressed in terms of Justice Harlan's "impractical and anomalous" test for finding the constitutional provisions which do or do not apply in a given territorial setting, Pet.App. 24, and not in equal protection terms. The court's discussion would fit nicely in the compelling governmental interest section of an equal protection analysis, but the court correctly rejected that rule of decision. Pet.App. 27 n. 22. The court's analytical approach, based on the *Insular Cases*, did not require a specific finding whether § 805 was based on race or not.

In fact, the distinction on which the land ownership restrictions is based is not one of race, it is one of political status, political rights, a special citizenship status. For the official explanation of the definition adopted by the Constitutional Convention, see Br.Opp.App. 126a-131a.

The classification embodied in the term "person of Northern Marianas descent" is simply one way of referring to those persons who, under the terms of Article 6, ¶ 1 of the Trusteeship Agreement, could validly approve and enter into an agreement like the Covenant. In other words, it is a way of identifying and referring to the "peoples concerned" in the phrase "the freely expressed wishes of the peoples concerned." Trusteeship Agreement, Art. 6, ¶ 1, 61 Stat. 3301 (April 29, 1947).

The United States was obligated to "promote the development of the inhabitants of the trust territory toward self-government or independence" in accordance

with "the freely expressed wishes of the people concerned." *Id.*

The "people concerned" were the Micronesians, the citizens of the Trust Territory. In 1969 the "people concerned," the Micronesian citizens, as a unified whole, initiated negotiations with the United States to terminate the Trusteeship. *Temengil v. Trust Territory of the Pacific Islands,* 881 F.2d 647, 650 (9th Cir. 1989). When the United States agreed to separate negotiations with the Northern Marianas in 1972, the "people concerned" became the Trust Territory citizens of Northern Marianas descent who had the political right to vote for or against the Covenant. Clark at 75; and Willens & Siemer at 1379-80 & n. 29. *See* Br. Opp. App. 126a-130a.

The members of that group were, in the sense described, citizens of the Northern Mariana Islands.

The second paragraph of the preamble of United States Public Law 94-241 recites the same language of Article 6, ¶ 1. 90 Stat. 263. And the final words of the resolving clause of the Covenant refers to the approval of the Covenant by the people of the Northern Mariana Islands in a plebiscite as "constituting on their part a sovereign act of self-determination." 90 Stat. 264. The negotiating history of the Covenant explains the significance of those words this way: "Finally, and fundamentally, this clause of the Preamble recognizes that approval of the Covenant by the people of the Northern Marianas will constitute on their part a sovereign act of self-determination – an exercise of their right freely to

express their wishes for self-government or independence and to determine their own political future." Marianas Political Status Commission, SECTION BY SECTION ANALYSIS OF THE COVENANT, p. 5.[11]

Thus, the classification denoted by the term "persons of Northern Marianas descent" is a political definition, in the "international sense," Pet.App. 27. Clark at 75-78. Before deciding to embrace the Covenant the people of the Northern Marianas were subject to the Trusteeship. Under the trusteeship they were "wards," to be protected and controlled by the United States as trustee. But they had the right to exercise their free choice to terminate the Trusteeship Agreement. Willens & Siemer at 1375-80. These "people" could have opted for self-government in any form they chose. They could have decided to declare their independence and the establishment of their own country. *Id.*

Those who had the special franchise to vote for or against the Covenant were Trust Territory citizens with cultural, family and historic ties to the Northern Mariana Islands, as distinct from the other Micronesians.

A comment by the leading authorities on the subject, Howard Willens and Deanne Siemer, confirms this view:

> This reference to ancestral bloodline was not intended to establish a racial or ethnic basis for determining qualification to acquire land. . . . In essence, the references to Chamorro and Carolinian blood are a shorthand

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[11] The SECTION BY SECTION ANALYSIS is reprinted in *Hearings on S.J. Res. 107 Before the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. at 356-496 (1975).*

> method of fixing the class of permanent residents in a particular time frame. Descent traced from *actual* ethnic Chamorros or Carolinians who were born and lived outside the Northern Marianas before 1950 would not qualify a person under article XII as being 'of Northern Marianas descent.'

Willens & Siemer at 1391-92 (1977) (emphasis original).

This classification of citizens of the Northern Mariana Islands – persons of Northern Marianas descent – includes persons of at least two distinct ethnic groups – Carolinian and Chamorro. DEFINING STATUS 521-26. Due to intermarriage during the pre-war years, there are a number of "persons of Northern Marianas descent" who are of Korean, or of Japanese extraction, and from the post-war period, some who are descendants of American GIs. There are tens of thousands of Guamanian Chamorros who do not qualify. Thousands of Carolinian citizens of the Federated States of Micronesia are excluded. It necessarily excludes, without regard to race, creed, color or national origin, all Americans, Japanese, Koreans, Filipinos, East Indians, American Indians, Australians, Viennese, Thais, Chinese, Taiwanese, Vietnamese and Palauans, to name only those ethnic and national groups presently represented in the polyglot population of the Commonwealth.[12]

This is a group classification similar to that of a tribe of Indians, or of tribal Indians living on or near a

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[12] For a listing of most of these categories, see 1990 U.S. Census (Commonwealth of the Northern Mariana Islands) (1990 CPH-6-CNMI) Table 90, p. 136.

federally recognized Indian reservation. *Morton v. Mancari*, 417 U.S. 535, 552 (1974). Classifications of this kind have both an ethnic or racial connotation and a political connotation, but they are not unconstitutional, because the benefits allowed are "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed in a unique fashion." *Morton*, 417 U.S. at 554.[13]

As the Ninth Circuit recognized, the motive force behind the land restrictions, as part of the political compromise memorialized in the Covenant, was that the people of the Northern Marianas did not want to achieve their long-time ambition to become part of the "American political family" only to become landless paupers in their new Commonwealth. Pet.App. 25 ("The land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors. *See* Willens & Siemer, 65 GEO.L.J. at 1406.").

The United States with its "involvement in the economic well being of the Marianas, whose economic strength was below that of the rest of the country," DEFINING STATUS at 591, firmly insisted during the negotiations that the land ownership restrictions must be

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[13] And, like reservation Indians, all Micronesian island societies tend to be racially homogeneous due to relative geographical and cultural isolation over time.

included in the Covenant as a mandatory provision. *Id.* at 592. Ambassador Williams insisted that "failure to carry out that obligation [to restrict land ownership] may be deemed to constitute a refusal of the Commonwealth to contribute its fair share to its own development and may be taken into consideration in determining the amount of U.S. [financial] assistance after the expiration of the first seven-year period." DEFINING STATUS at 592. *See,* Covenant, § 702.

"Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Regents of University of California v. Bakke,* 438 U.S. 265, 307 (1978). But programs which are not based on race are not forbidden by the Constitution even if they "have racially disproportionate impact." *City of Richmond v. J. A. Croson Co.,* ___ U.S. ___, 109 S.Ct. 706, 736 (Scalia, J. concurring); and *see Fortino v. Quasar Co.,* 950 F.2d 389, 393 (7th Cir. 1991) ("there is no evidence of [racial] discrimination here save what is implicit in wanting your own citizens to run your foreign subsidiary" where there is a "correlation between citizenship and national origin").

Thus, this Court ought not to accept Philippine Goods' invitation to see the § 805 restrictive policy in racial terms.

III.

THE NINTH CIRCUIT DID NOT MISAPPLY THE DOCTRINE OF THE *INSULAR CASES*

Philippine Goods' arguments under Parts II, III and V, amount to a complaint against the *Insular Cases*

doctrine and the way the Ninth Circuit applied that doctrine to the facts of this case. Pet. 11-28. The Hotel Nikko Saipan, Inc., *amicus curiae,* forthrightly urges the Court to take this case and either overrule the *Insular Cases* or hold that they have no application to the Northern Mariana Islands and the Covenant. At the same time, both Philippine Goods and Hotel Nikko rely heavily on this Court's latter-day application of the *Insular Cases* doctrine in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,* 426 U.S. 572 (1976).

However anachronistic the origins of the *Insular Cases* doctrine may be, it serves an important role today in reconciling conflicts which arise between the national interest and individual rights (of citizens and aliens) in the conduct of the foreign relations of the United States, and, it serves the same purpose in resolving conflicts between United States national interests and individual rights which arise in the context of this country's relations with its own off-shore territorial areas. *See,* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 3D, § 721 (applicability of individual rights in conduct of U.S. foreign relations) & Comment b. & Reporters' Notes 2 & 3 (discussing *The Insular Cases*). These problems (and the question of this Court's proper role in resolving them) will undoubtedly persist and if anything become more difficult of resolution in the 21st Century. *See* L. HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990); and K.C. Randall, *Foreign Affairs in the Next Century* (Book Review), 91 COL.L.REV. 2097 (1991) (reviewing Henkin's book).

As recently as 1990, this Court had occasion to overrule a Ninth Circuit decision as "contrary to this Court's decisions in the *Insular Cases*, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power." *United States v. Verdugo-Urquidez*, 494 U.S. 259, ___, 110 S.Ct. 1056, 1062 (1990).[14]

In a concurring opinion, Justice Kennedy raised a point which is quite probably relevant to this case. He noted that in "cases involving the extraterritorial application of the Constitution, we have taken care to state whether the person claiming its protection is a citizen, see, *e.g.*, *Reid v. Covert*, 354 U.S. 1 (1957), or an alien, see, *e.g.*, *Johnson v. Eisenstrager*, 339 U.S. 763 (1950)." *United States v. Verdugo-Urquidez*, 494 U.S. 259, ___, 110 S.Ct. 1056, 1066 (1990) (concurring opinion). He acknowledged that the "Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic," but emphasized that "this principle is only a first step" in the analysis. *Verdugo-Urquidez*, 110 S.Ct. at 1067 (concurring opinion). The next step in the analysis, he reasoned, is "[t]he question . . . what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations." *Verdugo-Urquidez*, 110 S.Ct. at 1067 (concurring opinion). Justice Rehnquist, in dissent, raised the same question in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 608 (1976) (dissenting opinion).

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[14] *Amicus* Hotel Nikko discusses the *Verdugo-Urquidez* decision, Nikko Br. 6-7, but Philippine Goods does not.

Although the record is silent on the subject, it appears that the owners of Philippine Goods and Transamerica Corporation are not citizens of the United States.[15] Presumably they are citizens of the Republic of the Philippines, but in any event they are alien residents of the Commonwealth.[16] As such, a state could deny the non-citizen owners of Philippine Goods the right to own land in the United States, under the authority of *Terrace v. Thompson* 263 U.S. 197 (1923) and *Oyama v. California,* 332 U.S. 633 (1948) (cited in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,* 426 U.S. 572, 603 n. 34 (1976)).

After noting that this Court has "not overruled . . . the so-called *Insular Cases,*" Justice Kennedy made this important point:

> These authorities, as well as *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936), stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.

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[15] "Philippine Goods is not only a member of the non-favored racial group for the purposes of Article XII, but also in the political arena." Pet. 20. Since Philippine Goods, the company, is a corporate citizen of the Commonwealth, we take this to be a reference to the Filipino owners of the company.

[16] The owner of *amicus* Hotel Nikko Saipan, Inc., Japan Airlines Development Corporation, would also appear to be an alien, Nikko Br. 1.

Verdugo-Urquidez, 110 S.Ct. at 1067 (concurring opinion). Then, Justice Kennedy quoted Justice Harlan's observation in *Reid v. Covert* that

> 'the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether *impracticable and anomalous*.' 354 U.S., at 74.

Verdugo-Urquidez, 110 S.Ct. at 1067 (concurring opinion) (emphasis added). That is precisely the same concurring opinion from which Circuit Judge Poole quoted as a preface to his analysis of this case in terms of the *Insular Cases* doctrine. Pet.App. 24. Justice Harlan concluded that the analysis under the *Insular Cases* doctrine was "analogous, ultimately, to issues of due process." *Reid,* 354 U.S. at 75 (concurring opinion).

> [O]ne can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.

Reid, 354 U.S. at 75 (Harlan, J., concurring).

And this "impracticable and anomalous" test is the principle which Philippine Goods finds so worthy of severe condemnation. Pet. 16-19 and 27-28. But, it is the law and it was applied quite correctly by the Ninth

Circuit in this case.[17] It is a due process clause for use in resolving conflicts between the United States government and individual citizens and non-citizens in the context of international and territorial affairs.

The Court of Appeals quite correctly gave great weight to the fact that this question arose in the context of an international agreement. Pet.App. 25-27. Apart from acknowledging the existence of the Covenant, Philippine Goods and *amicus* Nikko Hotel, fail to discuss this crucial element of "the conditions and considerations . . . that would make adherence to" the equal protection clause "impracticable and anomalous." *Verdugo-Urquidez,* 110 S.Ct. at 1067; and Pet.App. 24.

In an analogous case involving personal rights and treaty provisions, the Seventh Circuit held that discrimination in favor of Japanese executives on the basis of citizenship is not forbidden by the Civil Rights Act of 1964 where it stems from a treaty between the United States and Japan. *Fortino v. Quasar Co.,* 950 F.2d 389,

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[17] Given the non-racial nature of the favored class and the "compelling justification for the restrictions," Pet.App. 26, even if § 805 and Article XII are judged by an equal protection standard, they pass constitutional muster because there is a rational basis for their existence. *Harris v. Rosario,* 446 U.S. 651, 651-52 (1980) (In the exercise of its power under the Territory Clause of Art. IV, § 3, cl. 2, Congress may treat Puerto Rico differently from the states so long as there is a rational basis for doing so.). *See also,* Willens & Siemer at 1450-57.

393 (7th Cir. 1991) ("The exercise of a treaty right may not be made the basis for inferring a violation of Title VII."). *See, also, Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973) (Title VII does not forbid discrimination on grounds of citizenship).

The Court of Appeals discussed *Flores de Otero* and held that not every right subsumed within the equal protection clause can "ride the fundamental coattails" of the equal protection clause "into the territories." Pet.App. 23 n. 19. That reasoning is a correct application of the *Insular Cases* doctrine to the facts of this case. Furthermore, the Court of Appeals decision in this case cannot be "contrary to" this Court's decision in *Flores de Otero* as the petitioners contend, Pet. 11-16, for the reason that application of the *Insular Cases* doctrine must be on a case-by-case basis in order to "accommodate the unique social and cultural conditions and values of *the particular territory*" under consideration. Pet.App. 23 (emphasis added). *See Flores de Otero*, 426 U.S. at 599 n. 30; and Note, *Inventive Statesmanship vs. The Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA.L.REV. 1041 (1974). Hence, the *Flores* holding that the due process and equal protection guarantees apply "to residents of Puerto Rico," *Flores*, 426 U.S. at 600, is not controlling precedent for the Northern Marianas until this Court independently decides that the same rule should apply to the Northern Marianas. Each territory is different. DEFINING STATUS.

All of these cases demonstrate the continuing utility of the *Insular Cases* doctrine. Under those principles, each case must be decided on the basis of its own "particular context." Each particular constitutional

safeguard must be examined in that context, to determine whether it is "due" under those circumstances.

Given the social, cultural and economic reasons for restricting the ownership of the land base, Br.Opp.App. 119a-123a (constitutional history); and Br.Opp.App. 140a-141a (negotiating history), there is ample evidence for the Court of Appeals to have found that to strike down § 805 "would be both impractical and anomalous in this setting." Pet.App. 26.

This case was decided correctly.

IV.

ARTICLE XII DOES NOT VIOLATE § 805

As a fall-back position, in a presentation that detours far beyond the record, Philippine Goods contends that even if § 805 is allowed to stand, Article XII, as written and as applied by the Commonwealth Supreme Court, is inconsistent with the terms of § 805. Pet. 19-27.[18]

The problem with this argument is that it was clearly understood and agreed between the parties to the Covenant that while § 805 mandated implementation of the land ownership restrictions, it "will be entirely up to the Government of the Northern Marianas to determine the precautions which they will take

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[18] The pending litigation to which *amicus* Nikko Hotel refers in its brief, Nikko Br. 1, is the *Dela Cruz v. Hotel Nikko Saipan, Inc.* case cited by Philippine Goods in this part of its brief, Pet. 25.

to prevent their land from being alienated." Br.Opp.App. 141a.

Examination of the text and official explanation of Article XII shows that it is very nicely drawn to accomplish exactly the purpose intended, nothing more, nothing less. Pet.App. 74-76 (text of Art. XII); Br.Opp.App. 119a-134a (constitutional history); and Willens & Siemer at 1405-12.[19]

On the facts of this case, Philippine Goods cannot contend that the 40 year maximum term does not reasonably fit the § 805(a) requirement that "*long term* interests in real property" be limited to persons of Northern Marianas descent. (Emphasis added.) *See* Pet.App. 26 n. 20. Nor has it argued that 40 years is not enough time to give it a fair chance at a reasonable business profit.

The seminal decisions of the Commonwealth Supreme Court construing and applying Article XII are standard common law fare for the knowing reader. Br.Opp.App. 1a-79a. Philippine Goods' unseemly attempt, Pet. 21 ("The fear is more than theoretical."), to undermine the legitimacy of the Commonwealth Supreme Court's sensitive, scholarly, painstaking opinions by suggesting that the court's judgments (except for the dissent in *Ferreira* by special judge King, Pet.

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[19] Petitioners' criticism of the increase from 40 to 55 years in the permissible leasehold term, Pet. 26 and 28, is self-defeating: if the term limit is not severe enough, only the United States, or a person of Northern Marianas descent, would have capacity to claim a violation of § 805. Philippine Goods cannot, in effect, say: because the restriction is too relaxed, it must be eliminated.

23-24, a native of Indiana who was of course designated to sit by the Commonwealth Chief Justice) are part of a larger Commonwealth-wide, racially motivated regime, Pet. 19-27, bent on depriving a "non-favored racial group," Pet. 20, of its constitutional rights is as false as it is unsupported by the record.

In a recent decision of the Ninth Circuit, the argument that Article XII is inconsistent with § 805 was raised and flatly rejected. *Yokeno v. Mafnas,* No. 91-15745, slip op. 10363, 10375 (9th Cir. Aug. 28, 1992), Br.Opp.App. 80a, 92a.

In fact, the Commonwealth has an open-door economic policy which welcomes investors from anywhere on earth, including Philippine Goods and *amicus* Hotel Nikko Saipan, to full participation in the economic life of the Commonwealth. Because of the scant local labor force, the law allows business enterprises to freely import alien labor to meet its needs. Taxes are low, and, until the world-wide economic slowdown belatedly reached the islands, business in all sectors was booming. There is no discrimination in law or in fact, in public accommodations of all kinds, and, with the exception of the land ownership restrictions, everyone enjoys the full benefit and protection of local and federal law, with a full-time U.S. Attorney, the F.B.I. and a federal district court to give added security.[20]

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[20] To see that the Commonwealth Supreme Court is quite rational and competent, the Court need only peruse its first two decisions construing § 805 and Article XII, Br.Opp.App. 1a-79a. In all probability, the losing party in one or both of these cases will seek review here.

V.

THIS COURT SHOULD NOT STRIKE DOWN THE COVENANT'S LAND OWNERSHIP PROTECTIONS ON THE BASIS OF THE PETITIONERS' ALLEGATIONS OF CHANGED CONDITIONS

In the Court of Appeals Philippine Goods did "not contest the compelling justification for the [§ 805] restrictions. Rather, it attacks only the precision with which the restrictions operate to further these interests." Pet.App. 26. Now, the petitioner insists that because "[f]or better or for worse, during the last 12 years, the NMI has opted to enter the global economy," this Court should find, on the basis of the petitioners' allegations, that it is no longer impractical or anomalous to eliminate § 805 from the Covenant. Pet. 27-28.

The alleged facts are: economic progress, expansion of the visitor industry, hotel construction,[21] legalization of gambling for Tinian, 20 clothing manufacturing plants and the importation of workers from abroad who, as aliens, are not allowed to vote in Commonwealth elections. Pet. 27-28. The legal support is the decision in *King v. Morton,* 520 F.2d 1140, (D.C.Cir. 1975), in which the court of appeals remanded the case to the district court for an evidentiary hearing on the question "whether trial by jury [of an American citizen] in Samoa would be impractical and anomalous."[22]

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[21] Presumably including *amicus'* $100 million Hotel Nikko Saipan, Pet. 24-25.

[22] For a description of the outcome, see Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study,* 2 U.HAW.L.REV. 337, 375-76 (1980) (the evidence did not sustain the government).

While it may be appropriate to base a decision on the constitutional practicality of requiring the right to trial by jury in Samoa on facts adduced at trial in the District of Columbia, a similar remand in this case would put the entire Covenant on trial in the Superior Court of the Commonwealth of the Northern Mariana Islands, on Saipan. This is so, because as noted at the outset, § 805 of the Covenant is a material part of a complicated, integrated international agreement, each and every provision of which was the result of extensive negotiations between the United States and the Northern Mariana Islands.

Furthermore, § 805(a), in its terms, requires the Commonwealth to keep the land ownership restrictions in force for not less than 25 years following termination of the Trusteeship Agreement. Pet.App. 74.[23] That was the deal. This Court cannot revise that provision of the Covenant. It can only allow it to stand or strike it down. If it strikes it down, the entire Covenant comes undone and the parties go back to the bargaining table, or go elsewhere. The underlying circumstance here is a bilateral international agreement, not a statute nor a form of criminal procedure. The Court therefore must evaluate the constitutionality of § 805 on the basis of the record of the negotiating history, the legislative history of the Covenant's consideration in the United States Congress, and such facts as it may judicially notice.

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[23] That date is Nov. 3, 1986, Pet.App. 19 n. 14. Thus, the Commonwealth is treaty-bound to leave Article XII on the books until Nov. 3, 2011.

As for the facts alleged, even if taken as true, they either support the conclusion that the protection of the land base is *more important* than it was in 1970 or they are irrelevant. *See,* Pet.App. 26-27; and Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study,* 2 U.HAW.L.REV. 337, 367-72 and 381-387 (1980)

Finally, given the prevalence of land transactions like those challenged in the Article XII cases listed by the petitioner, Pet. 24-25, in which ineligible buyers use a Northern Marianas person or a dummy corporation as a front, there is reason to believe that Article XII has been, thus far, successfully circumvented by buyers like Japan Airlines, the parent company of *amicus* Hotel Nikko. Nikko Br. 1.

Indeed, petitioners' facts demonstrate that Article XII has neither discouraged foreign investors from taking a chance on the Commonwealth nor denied them a fair opportunity to make a reasonable profit with a 40-year leasehold tenancy. That much time is enough to justify investment in enterprises ranging from a hole-in-the-wall jewelry shop to a luxury resort hotel to a championship golf-course. In reality, the only thing of substance which Article XII denies the foreign investor is a chance to reap the enormous profits available to the fee owner (with a friendly front) in the Commonwealth real estate market.

CONCLUSION

For the reasons given, this Court should deny the petition for writ of certiorari.

If, however, certiorari is granted, the Court should examine the jurisdictional issue first and vacate the decision of the Court of Appeals.

Respectfully submitted,

THEODORE R. MITCHELL

Attorney for Respondents

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APPENDIX A

[Filed: July 5, 1991]

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

Appeal No. 89-003
Civil Action No. 86-86

MARIAN ALDAN-PIERCE,
Plaintiff/Appellee,

v.

LEOCADIO C. MAFNAS,
Defendant/Appellant.

OPINION

Argued and Submitted July 30, 1990

Counsel for
Defendant/Appellant

Theodore R. Mitchell, Esq.
P.O. Box 2020
Saipan, MP 96950

Counsel for
Plaintiff/Appellee:

Donald C. Williams, Esq.
Marcia K. Schultz, Esq.
Carlsmith, Ball, Wichman, Murray,
Case, Mukai & Ichiki
P.O. Box 241 CHRB
Saipan, MP 96950

Counsel for amicus curiae Saipan Bankers Association:[1] Steven L. Mayer, Esq.
Kent Walker, Esq.
Howard, Rice, Nemerovski, Canaday, Robertson & Falk
Three Embarcadero Center
7th Floor
San Francisco, CA 94111

BEFORE: DELA CRUZ, Chief Justice, VILLAGOMEZ and BORJA, Justices.

DELA CRUZ, Chief Justice:

We are presented in this appeal with the issue of whether the exercise of an option agreement ("option") to purchase real property in the Commonwealth violated the land alienation restriction of Article XII of the NMI Constitution ("Article XII") if persons who are not of Northern Marianas descent thereby acquired an equitable fee interest in the land.[2]

I.

The defendant, Leocadio C. Mafnas ("Mafnas"), appeals a summary judgment order compelling specific performance of the option. *Aldan-Pierce v. Mafnas,* Civil Action No. 86-86 (N.M.I. Tr. Ct. Oct. 15, 1986) (judgment). Finding no genuine issue of material fact, the Commonwealth Trial Court[3] concluded that the option

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[1] The Saipan Bankers Association filed a brief urging affirmance of the trial court decision.

[2] Article XII – the pertinent portions of which are set forth in part IV, *infra* – restricts acquisition of permanent and long-term interests in real property within the Commonwealth to persons of Northern Marianas descent.

[3] Since renamed the "Superior Court of the Commonwealth of the Northern Mariana Islands" pursuant to the Commonwealth Judicial Reorganization Act of 1989, 1 CMC §§3101-3404. *See* 1 CMC §3201.

did not violate Article XII and was, therefore, enforceable. *Aldan-Pierce v. Mafnas,* 2 CR 855 (C.T.C. 1986).[4]

A. Procedural and Factual Background

Mafnas, a person of Northern Marianas descent, owns in fee simple Lot 008 B 25, situated at San Roque, Saipan. This property contains an area of 8,708 square meters.

Mafnas and Antonia C. Villagomez ("Villagomez") – who is also of Northern Marianas descent – executed the option on September 15, 1984. Mafnas agreed to sell "a certain portion of Lot No. 008 B 17"[5] to Villagomez or her designee by warranty deed. The option, which became effective upon execution, was to remain in effect until July 7, 1985.

The option consideration of $500 was paid to Mafnas by Brian McMahon ("McMahon"), who is not of Northern Marianas descent. As directed by Randall T. Fennell ("Fennell") – who is also not of Northern Marianas descent – Villagomez[6] timely exercised the option by notifying Mafnas in writing that she wished to purchase the property. This notice (dated July 6, 1985) requires Mafnas to obtain a certificate of title to the property and to deliver it and a warranty deed to Villagomez, at which time the purchase price of $10 per square meter would be paid.

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[4]The court also considered and rejected claims of undue influence and unconscionability that have not been raised in this appeal.

[5]The portion which Mafnas owns is Lot 008 B 25.

[6]Villagomez was, at the time, employed by Fennell as his secretary. Fennell and McMahon are attorneys.

Mafnas refused to comply.

Villagomez subsequently assigned her interest under the option to Marian Aldan-Pierce ("Aldan-Pierce"), who filed the present action for specific performance on March 4, 1986.

In his answer to Aldan-Pierce's complaint, Mafnas alleged, *inter alia,* that Villagomez acted as Fennell and McMahon's agent – and that Fennell engaged her as his agent to acquire for himself and McMahon a permanent and long-term interest in real property in violation of Article XII.

B. The Superior Court Ruling

The trial court concluded that Villagomez was Fennell and McMahon's agent, and that they had control over her to (1) direct her to exercise the option, (2) turn over their purchase money to Mafnas after he executed a warranty deed to her, and (3) record the deed showing fee simple title in her name. However, the court determined that once Villagomez subsequently leases the property to Fennell and McMahon (as they had previously agreed) the agency relationship will terminate and a lessor-lessee relationship will commence:

> The "control" of the principal over the agent to which [Mafnas] bases his theory vanishes upon execution of the lease. There is no substance or merit to [Mafnas'] argument that the prior agency or fiduciary relationship continues and supercedes the lease agreement.

Aldan-Pierce v. Mafnas, 3 CR at 864. Therefore, the court ruled, the option did not violate Article XII, and was enforceable.

Mafnas appeals.[7]

II.

We review a grant of summary judgment *de novo*. *MPLC v. Kan Pacific Saipan, Ltd.*, No. 90-014 (N.M.I. Nov. 21, 1990) (amended opinion). If there is no genuine issue of material fact, the analysis shifts to whether the substantive law was correctly applied. *Id.*

The sole issue Mafnas raises on appeal concerns the constitutional validity of the option. He contends that when Villagomez exercised the option, Fennell and McMahon acquired a freehold (equitable fee) interest in Commonwealth real property. This, he argues, violates Article XII.[8]

III.

Before reaching the merits, we must address the threshold question of our jurisdiction.

Aldan-Pierce has moved to dismiss this appeal on the ground that we lack jurisdiction. She contends that only the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") has jurisdiction to hear the appeal.

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[7]This appeal was initially taken to the Appellate Division of the District Court for the Northern Mariana Islands, which affirmed the trial court ruling. *Aldan-Pierce v. Mafnas*, 3 CR 326 (D.N.M.I. App. Div. 1988). Mafnas subsequently appealed to the Ninth Circuit Court of Appeals. That court granted Mafnas' motion to dismiss the appeal on March 29, 1990. Mafnas filed an appeal of the trial court decision with this Court on May 15, 1989. Part III, *infra*, discusses the question of our jurisdiction over this appeal.

[8]Mafnas initially raised (but subsequently abandoned) an issue concerning imposition of a sanction by the Appellate Division of the District Court for the Northern Mariana Islands.

We note that this appeal was pending before the Ninth Circuit on May 2, 1989, the effective date of the Commonwealth Judicial Reorganization Act of 1989, 1 CMC §§ 3101-3404 ("Act"). The Act transferred to this Court appellate jurisdiction over all Commonwealth cases pending before both the Appellate Division of the District Court for the Northern Mariana Islands ("Appellate Division") and the Ninth Circuit. 1 CMC §3109(b).

In *Wabol v. Villacrusis,* No. 89-005 (N.M.I. Dec. 11, 1989), we examined the validity of 1 CMC §3109(b). We concluded that the statute violated neither the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, *reprinted in* CMC vol. 1 at B-101 *and in* 48 U.S.C.A. §1681 note (West 1987) ("Covenant"), nor 48 USC §1694b(c), the federal statute empowering the Ninth Circuit to hear appeals from Appellate Division rulings.

Subsequent to our *Wabol* ruling, the Ninth Circuit rendered a contrary decision concerning the validity of 1 CMC §3109(b):

> [A]lthough the Act by its terms applies retroactively to appeals from local trial courts which were pending in the appellate division of the district court when it was passed . . . NMI is without power under the Covenant to divest [the Ninth Circuit] of jurisdiction over appeals properly filed from a final order of the appellate divison of the district court entered before passage of the Act.

Wabol v. Villacrusis, 908 F.2d 411, 419 (9th Cir. 1990) (amended opinion).

We are faced with the question of whether we should defer to this decision. For several reasons, we decline to do so.

First, we note that the appeal of this case to the Ninth Circuit was dismissed upon Mafnas' voluntary motion. The Appellate Division subsequently issued a mandate – based on its earlier decision[9] – to the Commonwealth Superior Court. When challenged on appeal, the mandate was vacated by the Ninth Circuit, which ruled that the Appellate Division lacked jurisdiciton over the appeal after May 2, 1989. *Mafnas v. United States District Court for the Northern Mariana Islands,* 919 F.2d 101 (9th Cir. 1990). In its decision, the Ninth Circuit recognized the instant appeal taken by Mafnas to this Court. Recently, the Ninth Circuit considered an appeal from our issuance of a writ of prohibition to the Superior Court[10] ordering it to disregard the Appellate Division's mandate. In that decision, *Mafnas v. Superior Court of the Commonwealth of the Northern Mariana Islands,* No. 90-16078 (9th Cir. June 18, 1991) (1991 WESTLAW 102977), the Ninth Circuit dismissed the appeal as moot because of its earlier decision to vacate the Appellate Division's mandate; the court again recognized the instant appeal to this Court.

Second, we take judicial notice of the fact that the Ninth Circuit's ruling in *Wabol* is the subject of a petition for reconsideration.

Third, our *Wabol* ruling has been appealed to the Ninth Circuit pursuant to Covenant Section 403.[11]

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[9] *See* n.7, *infra.*.

[10] *Mafnas v. Superior Court,* Orig. Action No. 90-003 (N.M.I. June 28, 1990).

[11] Covenant Section 403 provides that the Ninth Circuit has jurisdiction over appeals from our decisions involving federal questions for the first fifteen years of this Court's existence. *See Sablan v. Iginoef,* No. 90-008 (N.M.I. Nov. 13, 1990) (order concerning transmittal of appeal to the Ninth Circuit).

That appeal has not been decided. Although the Ninth Circuit's *Wabol* ruling notes that this Court's decision need not be accorded full faith and credit (since it is subject to review by that court) the Ninth Circuit has not yet reviewed our decision.

Thus, we shall follow our decision in *Wabol* and consider the appeal in this case. 1 CMC §3109(b). Aldan-Pierce's motion to dismiss for lack of jurisdiction is denied.

IV.

The issue confronting us relates to Covenant Section 805 ("Section 805"), in addition to Article XII. In analyzing the validity of the exercise of the option, it is necessary to first examine Section 805, which requires that the Commonwealth regulate the alienation of permanent and long-term interests in real property to restrict acquisition of such interests to persons of Northern Marianas descent. Next, we will examine Article XII to determine how Section 805 was implemented. We shall thereafter analyze the facts of this case to determine whether the trial court ruled correctly.

A. Section 805

Section 805 provides, in pertinent part:

> Except as otherwise provided in this Article and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to

promote their economic advancement and self-sufficiency:

> (a) *will* until twenty-five years after the termination of the Trusteeship Agreement, and may thereafter, *regulate* the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Marianas descent . . . .

(Emphasis added.)[12]

"[I]t will be entirely up to the Government of the Northern Marianas and the people of the Northern Marianas to determine the precautions which they will take to prevent their land from being alienated." Marianas Political Status Commission, *Section-by-Section Analysis of the Covenant* 117 (1975).[13] Definition of the operative terms and phrases of Section 805 – including "long term interests in real property," "acquisition," and "persons of Northern Mariana Islands descent" – was left to the NMI as its responsibility in implementing the provision. *Id.*

B. Article XII

The sole implementing vehicle for Section 805 is Article XII, which became operative when the NMI Constitution went into effect on January 9, 1978.

We now examine each of the original provisions[14] of Article XII. Section 1 provides:

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[12] Covenant Section 105 provides, *inter alia,* that Section 805 "may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands."

[13] The Marianas Political Status Commission negotiated the Covenant.

[14] Certain provisions of Article XII were amended in 1985, after the option at issue was exercised. None of the amendments have bearing upon our analysis.

The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2 provides:

The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition if the mortgagee does not hold the permanent or long-term interests in real property for more than five years.[15]

Section 3 provides:

The term permanent and long-term interests in real property used in section 1 includes freehold interests and leasehold interests of more than forty years[16] including renewal rights.

Section 4 provides:

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern

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[15] Extended to ten years by amendment adopted in 1985.

[16] Extended to fifty-five years by amendment adopted in 1985.

> Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5 sets forth requirements for corporations to qualify as a "persons of Northern Marianas descent." Article XII, §6 provides, in pertinent part, that "[a]ny transaction in violation of section 1 shall be void *ab initio*."

Clearly, under Article XII only persons of Northern Marianas descent may acquire permanent and long-term interests in real property in the Commonwealth. The only exceptions are (a) transfers to a spouse (who is not of Northern Marianas descent) by inheritance in certain circumstances, and (b) transfers to a mortgagee (such as a bank or lending institution) by foreclosure on a mortgage if the mortgagee does not hold an interest in the property for more than a specified period. Article XII, §2.

In analyzing the option at issue, we will consider the intent and purpose of Section 805 and Article XII.[17]

V.

The parties agree that there is no genuine issue of material fact concerning the constitutionality validity (or invalidity) of the exercise of the option. We concur. A review of the affidavits and documents supporting and

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[17] We note that Alden-Pierce does not challenge the validity of either provision under the U.S. Constitution. *Cf. Wabol v. Muna*, 2 CR 963 (D.N.M.I. App. Div. 1987), in which the Appellate Division considered and rejected constitutional challenges to both provisions.

opposing Aldan Pierce's motion for summary judgment confirms that the material facts are not in dispute.

A. The Options.

The idea of an option to purchase or lease the San Roque property was apparently conceived before August 1, 1980, by Fennell and other persons who are also not of Northern Marianas descent. Declaration of Randall T. Fennell (August 27, 1986) (hereafter "Fennell Affidavit"). The record reveals that no fewer than five options preceeded the option at issue in this appeal.

The first, dated August 1, 1980, was negotiated by one Howard Luke. Fennell Affidavit at 1. This option, executed by Mafnas, as "Owner", and Luke and Fennell, as "Buyers", states, in part:

> . . . .
>
> 2. *Agreement to Sell or Lease.* Owner agrees to convey in fee simple absolute said property, and all of it, or any portion thereof required by Buyers, to Buyers, or their designee pursuant to the terms of this agreement, provided, however, that if at any time from the execution of this agreement it is not legal under the laws and Constitution of the Commonwealth of the Northern Mariana Islands for Buyers to hold in fee interest, then Owner agrees to convey said property in fee simple to any person designated by Buyers who has the legal capacity to own said property in fee simple absolute, or to lease said property to Buyers for as long a term as is legally permissible.
>
> . . . .

This option expired, unexercised, on April 30, 1981.[18]

[18]We note that Article XII would clearly have been violated if Mafnas had conveyed his fee interest in the property to Luke and Fennell under this option.

A section option was executed on May 1, 1981, by Mafnas, as "Owner", and McMahon and Fennell, as "Buyers." It is essentially the same as the first option, containing a paragraph identical to the provision quoted above. This option expired, unexercised, on October 31, 1981.

A third option was executed on April 7, 1982, again by Mafnas, as "Owner", and McMahon and Fennell, as "Buyers." Except for the dates, it is essentially the same as the first and second options. This option expired, unexercised, on June 7, 1982.

A fourth option was executed on July 13, 1983, by Mafnas, as "Owner," and Fennell as "Buyer." This option was for a forty-year lease.[19] It expired, unexercised, on July 12, 1984.

A fifth option – again, to lease the property – was executed by Mafnas, as "Owner," and Villagomez, as "Buyer," on July 7, 1984, before the fourth option had expired. Other than a difference in consideration and a reduction in the area to be leased, this option was essentially the same as the fourth option. It expired, unexercised, on July 7, 1985.

A sixth option – executed on September 15, 1984, before the fifth option expired – is the option the exercise of which is at issue. This option enabled Villagomez to purchase Mafnas' fee interest to the entire property. As noted above, Villagomez exercised the option on July 6, 1985, a day before it was to expire.

According to the option, Villagomez may assign all or any part of her rights, duties, and obligations. She

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[19]We note that had Mafnas leased the property to Fennell under this option, Article would *not* have been violated.

assigned her rights to Aldan-Pierce on January 13, 1986, "for $10.00 . . . and other good and valuable consideration . . . ." Excerpts of Record at 8.

B. The Affidavits

According to Villagomez:

. . . .

2. In 1984, I was approached by Mr. Brian McMahon and Mr. Randall Fennell, who asked if I would be interested in holding title to property in San Roque owned by Leocadio Mafnas.

3. Under my agreement with Mr. Fennell and Mr. McMahon, they would provide the money for an option agreement between me and Mr. Mafnas. If the option was exercised, they would provide the money to purchase the property. I, in return, would grant them a lease for the maximum term permitted by law for minimal consideration.

. . . .

Affidavit of Antonia C. Villagomez (July 25, 1986) (hereafter "Villagomez Affidavit").

According to Fennell, he and Mafnas (who was advised by a "Mr. Magofna") negotiated the option at issue. Fennell Affidavit at 2. Fennell also stated that he and McMahon had an oral agreement with Villagomez (and subsequently with Aldan-Pierce) to "provide the money for the land purchase in return for a lease for the maximum length allowed by law." *Id.* "Ms. Villagomez left negotiation of the options to Mr. McMahon and I." *Id.*

McMahon echoed Fennell's statement regarding their agreement with Villagomez. Declaration of Brian T. McMahon (Aug. 27, 1986) (hereafter "McMahon Affidavit").

According to Mafnas, "both Mr. Fennell and Mr. McMahon[ ] made it clear to me that the . . . Option Agreement, although it was to be executed by Antonia C. Villagomez, was for the sole benefit of Mr. Fennell and Mr. McMahon." Affidavit of Leocadio C. Mafnas (hereafter "Mafnas Affidavit") at 2 (Oct. 7, 1986). He further stated that McMahon personally paid him the $500 consideration for the option. *Id.*[20]

"I am not, nor have I ever been, a 'passive agent, engaged and controlled by Attorney Fennell . . .' as alleged [by Mafnas] . . . ." Declaration of Marian Aldan-Pierce (Aug. 27, 1986) (hereafter "Aldan-Pierce Affidavit"). She also stated:

. . . .

6. I have agreed with Randall Fennell and Brian McMahon that, if I prevail in this action, I will lease them the subject property for the maximum length provided by law. They in return have agreed to provide the funds to exercise the option. I will retain the fee ownership.

. . . .

Aldan-Pierce Affidavit at 2.

At the summary judgment hearing, the trial court allowed Aldan-Pierce to file a reply memorandum to Mafnas' memorandum in opposition by the following day, but made no mention of permission to file supplemental affidavits. *Aldan-Pierce v. Mafnas,* Civil Action No. 86-86, Transcript of Proceedings at 29 (October 8, 1986). Nonetheless, after the hearing Aldan-Pierce filed three supplemental affidavits in addition to her reply memorandum. It is not clear whether the trial court considered these post-hearing affidavits in rendering summary judgment, there being no reference to them in its memorandum

opinion. The court apparently did not act upon Mafnas' motion to strike the supplemental affidavits.

The supplemental affidavits were evidently introduced to prove that the oral agreement between Aldan-Pierce and Fennell and McMahon did not require Aldan-Pierce to hold or convey title to the property pursuant to their instructions. "Under our agreement, they receive a lease, but other than that what I do with the title is my business." Supplemental Affidavit of Marian Aldan-Pierce (Oct. 9, 1986) (hereafter "Aldan-Pierce Supplemental Affidavit").

VI.

Since the material facts are not in dispute, we must determine whether the law was correctly applied below. *Kan Pacific Saipan, Ltd., supra.*

We begin by noting that Fennell and McMahon – neither of whom are of Northern Marianas descent[21] – may not legally acquire "permananent and long-term interests in real property within the Commonwealth." Article XII, §1. Persons who are not of Northern Marianas descent are prohibited from acquiring such interests by "sale, lease, gift, inheritance or other means." Article XII, §2. Any transaction violating the constitutional restriction is void *ab initio* – void from the beginning, as if it had never occurred. Article XII, §6.

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[20] Although untimely filed, this affidavit was considered by the trial court when it ruled upon Aldan-Pierce's motion for summary judgment. *Aldan-Pierce v. Mafnas*, 2 CR at 858-59.

[21] This point is not at issue.

A. "Freehold Interests" under Article XII

The "permanent and long-term interests" restricted from acquisition by persons who are not of Northern Marianas descent "includes freehold interests and leasehold interests of more than fifty-five years . . . ." Article XII, §3.[22] "Freehold interests are all types of ownership or title – fee simple, fee tail, and life estate . . . ." Committee on Personal Rights and Natural Resources, *Report to the [First NMI Constitutional] Convention, Committee Recommendation No. 8: Restrictions on Land Alienation* at 7 (November 11, 1976).[23] A "freehold" is:

> An estate in land or other real property, of uncertain duration; that is, either of inheritence or which may possibly last for the life of the tenant at the least (as distinguished from a leasehold) . . . .
>
> An estate to be a freehold must possess these two qualities: (1) Immobility, that is, the property must be either land or some interest issuing out of or annexed to land; and (2) indeterminate duration, for if the utmost period of time to which an estate can endure be fixed and determined, it cannot be a freehold.

Black's Law Dictionary 598 (5th ed. 1979). "An equitable estate is considered, to all intents and purposes, as a legal estate." 31 C.J.S. *Estates* §5 (1964). An equitable interest of indeterminate duration is encompassed within a freehold interest.[24] The absence of any language

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[22] As noted in part IV B, *infra*, prior to 1985 this provision specified maximum leasehold interests of forty years.

[23] If necessary, in construing constitutional provisions we will consult legislative history. *Camacho v. Northern Marianas Retirement Fund*, No. 90-007 (N.M.I. Sept. 21, 1990).

[24] This interpretation comports with the apparent intent of Section 805 in restricting acquisition of "interests" in real property:

[footnote continued]

excluding such interests from the restriction in Article XII leads us to conclude that they are within the restriction.

On its face, the option at issue provides that a person of Northern Marianas descent will acquire title to the property if it is exercised. Mafnas argues that although Villagomez' name appears on the option, she (and now Aldan-Pierce, as her assignee) will acquire only bare legal title to the property, should he transfer his title. He contends that Fennell and McMahon have already acquired an equitable fee interest in the property, in violation of Article XII. This occurred, he asserts, when Villagomez – acting as an agent-trustee – acquired the equitable fee interest upon exercise of the option.

Initially, we must determine whether Villagomez acquired such an interest.

B. Acquisition of Equitable Fee by Optionee

"An option to purchase property is a contract wherein the owner, in return for valuable consideration, agrees with another person that the latter may buy property

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> [N]ormal usage of the term in American law would cover any right to use or derive profit from land for any period of time. Thus, not only ownership and leases are covered; equitable interests, of the sort possessed by the beneficiary of a trust . . . would . . . appear to be reached.

Office of Transition Studies and Planning, *Briefing Papers for the Delegates to the Northern Marianas Constitutional Convention, Briefing Paper No. 12: Restrictions on Land Alientation* at 19-20 (1976). *See also Sorenson v. City of Bellingham,* 496 P.2d 512, 514 (Wash. 1972) ("[f]reeholders are owners of either a legal or equitable title to real estate"); 31 C.J.S. *Estates* §1 (the term "interest" as applied to property "may include both legal and equitable rights").

within a specified time upon expressed terms and conditions." *Mohr Park Manor, Inc. v. Mohr,* 424 P.2d 101, 104 (Nev. 1967), *appeal after remand, Mohr Park Manor, Inc. v. Bank of Nevada,* 490 P.2d 217 (Nev. 1971). "[S]o long as it remains unaccepted, [an option] is a unilateral writing lacking mutual elements of a contract, but when accepted by [an] optionee, an executory contract, which is mutually binding on the parties, arises." *Id.* at 105; *see also Anderson v. Overland Park Credit Union,* 643 P.2d 120 (Kan, 1982). "[W]hen the optionee has made his election and the contract has ceased to be an option and has ripened into a mutually enforceable bilateral contract, it becomes subject to specific performance." *Bobo v. Bigbee,* 548 P.2d 224, 229 (Okla. 1976). The optionee becomes the owner of an equitable interest in the land. *Phillips v. Tetzner,* 53 A.2d 129 (Pa. 1947); *Commonwealth v. Gerlach,* 159 A.2d 915 (Pa. 1960).[25]

Thus, when Villagomez exercised the option, she acquired an equitable interest in the property. *Phillips, supra.*[26]

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[25] An equitable conversion occurs

> when a contract for the sale of real property becomes binding upon the parties. The purchaser is deemed to be the equitable owner of the land and the seller is considered to be the owner of the purchase price. This, because of the maxim that equity considers as done that which was agreed to be done.

Harrison v. Rice, 510 P.2d 633, 635 (Nev. 1973). "Equitable conversion does not occur on the date of an option contract because such a contract is not subject to specific performance on that date, but where the option has been exercised, there is a conversion." 18 C.J.S. *Conversion* §6 (1990).

[26] An assignee of an optionee may enforce vested contract rights. *Beran v. Harris,* 205 P.2d 107 (Cal. Dist. Ct. App. 1949). Thus, as Villagomez' assignee, Aldan-Pierce may enforce the vested right that arose after the option was exercised.

We now consider whether the record supports Mafnas' contention that Villagomez acted for Fennell and McMahon through an agency-trust relationship.

C. The Agency-Trust Relationship

Agency

An agent is a person who agrees to act for and is subject to the control of another. *Repeki v. MAC Homes (Saipan) Co., Ltd.*, No. 90-002 (N.M.I. Mar. 14, 1991) quoting *Restatement (Second) of Agency* §§1, 14 (1958).[27] An agency relationship must be based on an agreement between the parties. *Repeki, supra.* An agency relationship may exist "although the parties did not call it agency and did not intend the legal consequences of the relation to follow." *Restatement (Second) of Agency* §1, Comment b.

"The existence of an agency relationship is generally a question of fact to be determined by the trier of fact." *Repeki,* slip op. at 14. However, the existence of such a relationship is a question of law where the material facts from which it is to be inferred are not in dispute. *Id.* at 15. The material facts from which Mafnas urges that an agency relationship can be inferred were not in dispute. Accordingly, this issue presents a question of law which we review de novo. *Id.*

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[27] Two or more persons may act jointly to engage and authorize an agent to act on their behalf. *Restatement (Second) of Agency* §20, Comment f. Common law rules expressed in the *Restatements* are pertinent to our analysis under 7 CMC §3401, which provides that such rules "shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . ."

Aldan-Pierce contends that she is not Fennell and McMahon's agent – that their agreement is actually an entrepreneurial venture akin to a partnership.[28]

Despite Aldan-Pierce's protestations to the contrary, the trial court was correct in concluding that her predecessor Villagomez was Fennell and McMahon's agent. Villagomez agreed to act at their direction, and did so when she signed the option on September 15, 1984, and exercised it on July 6, 1985. *See Dixon v. Huggins,* 495 S.W.2d 621 (Tex. Ct. App. 1973) (party purchasing property with payor's knowledge, permission and money was payor's agent in transaction).

As Villagomez' successor, Aldan-Pierce assumes the role of agent.

As noted above, the trial court ruled that the agency relationship will terminate the moment Aldan-Pierce leases the property to Fennell and McMahon, and a constitutionally permissible lessor-lessee relationship will be established. Aldan-Pierce contends that (even accepting that she is currently Fennell and McMahon's agent) the ruling is correct. Because of our analysis below, we do not need to consider the question of precisely when the agency relationship will terminate. That is because Aldan-Pierce acts as Fennell and McMahon's trustee.

Trust

A. Resulting Trust

"Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase

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[28] This contention is examined in part VII B, *infra.*

price is paid, except as stated in §§441, 442, and 444." *Restatement (Second) of Trusts* §440 (1959).[29] "Property that is purchased by an agent in his own name, but with the principal's money, is held in trust for the benefit of the principal." *Dixon*, 495 S.W.2d at 625; *see also* 89 C.J.S. *Trusts* §114 (1955).[30]

The trustee of a resulting trust holds only the naked legal title for the benefit of the person furnishing the consideration, *Ohio State Life Ins. Co. v. Union Properties*, 52 N.E.2d 542, 543 (Ohio Ct. App. 1943), who holds the equitable interest.[31]

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[29]This rule is based upon an inference that "the purchaser does not intend that the transferee should have the beneficial interest in the property, but that the purchaser himself shall have the beneficial interest." *Id.*, Introductory Note to Topic 4 at 391. "The rule of equity is that when property is taken in the name of a grantee who did not advance the consideration, there is a presumption that the grantee holds the legal title subject to the equitable ownership of the person who advanced the consideration." *Richards v. Richards*, 489 P.2d 928, 930 (Wa. App. 1971); *see also Becchelli v. Becchelli*, 508 P.2d 59 (Ariz. 1973). It is important to note that a resulting trust may arise regardless of whether the transferee is the agent of the purchaser. *See, e.g., United States v. District of Columbia*, 596 F.Supp. 725 (D.Md. 1984) (in dispute over ownership of hospital property, although U.S. took title to property, District of Columbia was entitled to resulting trust because it paid purchase price and Congress intended it to have equitable interest); *Lewis v. Spitler*, 403 A.2d 994 (Pa. Super. Ct. 1979) (party who provided acquaintance with part of sum used to acquire property entitled to partial resulting trust in property).

[30]If the agent wrongfully takes title in his own name, the agent may hold the property upon a constructive trust for his principal. *See Restatement of Restitution* §190 (1937).

[31]"[L]egal and equitable ownership of property may be vested in different persons, especially in situations where a question of trusts arises." *Hereford Land Co. v. Globe Industries, Inc.*, 387 S.W.2d 771, 775 (Tex. Ct. App. 1965).

"Within the rule that a resulting trust arises in favor of the one paying for a conveyance to another, a 'conveyance' includes any transfer of title, legal or equitable...." 89 C.J.S. *Trusts* §118; *See McClellan v. Beatty,* 53 N.E.2d 1013 (Ind. App. 1944); *rehearing denied* 55 N.E.2d 327 (Ind. App. 1944) (equitable title held by vendee under executory land sale contract subject to resulting trust in favor of payor). Thus, since Villagomez (and now Aldan-Pierce, as her assignee) has acquired an equitable interest in the property, unless any exception applies a resulting trust for this interest has arisen in favor of the persons who provided the option consideration, Fennell and McMahon.[32]

The exceptions cited in *Restatement (Second) of Trusts* §440 preclude a resulting trust if the payor: (1) manifests an intention that no trust should arise (§441), (2) purchases the property in the name of a relative "or other natural object of bounty" (§442), or (3) purchases the property to accomplish an illegal purpose (§444).

We will initially consider the last two exceptions.

Neither Villagomez nor Aldan-Pierce are "natural object[s] of bounty" to Fennell or McMahon:

> The rule stated in this Section is applicable where the payor and transferee respectively are in the relation of husband and wife; father and child; mother and child; father-in-law and son-in-law; grandparent and grandchild. . . . It applies also where the payor stands in loco parentis to the transferee; that is, where the payor whether or not

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[32] The record is unclear as to whether the option consideration belonged to *both* Fennell and McMahon. In light of our ultimate decision in this case, this question is academic.

> related to the transferee has assumed to act in the place of a parent of the transferee.

Id. §442, Comment a. Fennell and McMahon are not related to Villagomez or Aldan-Pierce, and their social or professional association with them are insufficient to trigger this exception.

With respect to the third exception – purchase in the name of another to accomplish an illegal purpose – closer analysis is necessary. An analogy may be drawn to case law from jurisdictions in which it is (or was formerly) illegal for aliens to acquire land. Land acquired by an alien is subject to forfeiture:

> In such States the equitable interest of an alien beneficiary of a trust of land is likewise subject to forfeiture. . . . [I] f an alien pays the purchase price for land and at his direction the land is transferred to another under such circumstances that a resulting trust would arise if the payor were not an alien, a resulting trust arises in favor of the alien, and his interest is subject to forfeiture . . . .

Id., §444, Comment f. Thus, unless and until an alien's equitable interest is ruled invalid in a judicial proceeding, a resulting trust in real property in the alien's favor is valid. *Isaacs v. DeHon,* 11 F.2d 943 (9th Cir. 1926).

We adopt the principle set forth in *Isaacs.* A resulting trust in real property in the Commonwealth in favor of a person who is not of Northern Marianas descent is valid, unless the equitable interest held for them in trust is declared, in a judicial proceeding, to be violative of Article XII. If the equitable interest is ruled violative of Article XII, the underlying transaction through which the

person who is not of Northern Marianas descent acquired the interest becomes void *ab initio.*[33] Article XII, §6.

Accordingly, the third exception to the presumption of a resulting trust does not apply in this case.

The first exception – *Restatement (Second) of Trusts* §441 (a resulting trust will not arise if the payor manifests an intention that no trust should arise) – is, at first glance, potentially applicable. However, according to official commentary to this provision:

> Where a transfer of property is made to one person and the purchase price is paid by another, the inference that a resulting trust was intended is rebutted if it appears that the payor intended that the transferee should have the beneficial interest in the property transferred. This is the case where it appears that the payor intended to make a gift of the property to the transferee (see §447), or to make a loan of the purchase price to the transferee. See §445. So also, no resulting trust arises where the purchase price was paid to discharge a debt or other obligation owed by the payor to the transferee. See §446.

Id., Comment a. There is no evidence in the record that Fennell and McMahon intended to make a loan of the purchase price to Villagomez, or that the money was paid to discharge a debt or other obligation.

Did Fennell and McMahon intend to make a gift of the property to Villagomez? In fact, the record indicates

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[33] In most U.S. jurisdictions prohibiting acquisition of land by aliens, only the state may bring proceedings to divest the alien of his property. *See, e.g., Isaacs, supra.* This is not the case in the NMI. When the issue has been properly raised, violations of Article XII may be addressed in proceedings involving only private parties.

that *prior to* exercise of the option, the pair manifested an intention to retain an equitable interest of *indeterminate* (i.e., uncertain) duration. Villagomez' affidavit supports this conclusion.[34] At the very least, it is clear that Fennell and McMahon intended to retain an equitable interest limited to a leasehold for the maximum period permitted under Article XII. For the reasons stated below, Fennell and McMahon could not make a gift of this interest to Villagomez or Aldan-Pierce *at the time of or subsequent to* their acquisition of it.

To explain why this is so, it is necessary to state our ultimate decision in this case.

Today we rule that a resulting trust has arisen in favor of Fennell and McMahon for a constitutionally imper-

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[34] The record indicates that there may have been an ulterior motive for acquiring title in Villagomez' (or Aldan-Pierce's) name: to obtain a constitutionally impermissible interest in real property under the appearance of compliance with Article XII. According to official commentary to *Restatement (Second) of Trusts* §441:

> Among the factors which are or may be of importance in determining whether or not the payor manifested an intention to make a gift of the property to the transferee, are (1) declarations as to his intention made by the payor before or at the time of or subsequent to the transfer; (2) the relationship between the payor and the transferee; (3) whether the transferee is an individual or a corporation, and if a corporation whether it is a charitable corporation; (4) the relative financial positions of the payor and the transferee; (5) whether a gift by the payor to the transferee would be improvident; (6) *the presence or absence of any probable reason for taking title in the name of the transferee other than to give him the beneficial interest.*

Id., Comment b (emphasis added). "It is easier to find a manifestation of intention to make a gift [to rebut the presumption of a resulting trust] where no probable reason for taking title in the name of a transferee exists other than to give him the beneficial interest than it is where such reasons exist." *Id.*

missible interest in real property. Since this challenged acquisition violates Article XII, we declare it invalid. Because Article XII, §6 provides that transactions underlying impermissible acquisitions of real property are void *ab initio,* our decision "springs back" to September 15, 1984, when the option (the underlying transaction) was executed. Fennell and McMahon are thus retroactively divested of their constitutionally impermissible interest. Thus, they could not (and may not now) make a gift of that interest to Villagomez or Aldan-Pierce. In short, they had (have) nothing to give.

Accordingly, because of principles set forth in the *Restatement (Second) of Trusts* and because of the operative effect of Article XII, no exception applies in this case to rebut the presumption of a resulting trust. Despite Aldan-Pierce's contention to the contrary, such a trust has arisen in favor of Fennell and McMahon.[35]

B. Resulting Trust for Limited Interest

Aldan-Pierce cites authority for the proposition that a resulting trust may be rebutted in part. She contends that although Fennell and McMahon may have acquired an equitable interest in real property in the Commonwealth, their interest is limited to a constitutionally permissible leasehold.

Fennell and McMahon disclaim any intention to take more than a leasehold for fifty-five years, the maximum interest they may legally acquire under Article XII.

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[35] A resulting trust may arise even though the party to be charged as trustee "may never have agreed to the trust and may have really intended to resist it." *Shepard v. Dougan,* 76 P.2d 442, 445 (Idaho 1937); *see also Hawe v. Hawe,* 406 P.2d 106 (Idaho 1965).

They contend that the underlying fee will remain with Aldan-Pierce.

It is, in fact, possible for a payor to acquire a leasehold interest in real property through a resulting trust. According to pertinent authority:

> Where a transfer of property is made to one person and a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made in such proportion as the part paid by him bears to the total purchase price, unless he manifests an intention that no resulting trust should arise or that a resulting trust to that extent should not arise.

Restatement (Second) of Trusts §454. A relevant illustration of this principle is afforded in *Byers v. Doheny*, 287 P. 988 (Cal. Dist. Ct. App. 1930).[36] In *Byers*, a payor provided one-quarter of the purchase price for a parcel of real property under an agreement that he would be entitled to a leasehold interest. According to the *Byers* court:

> If the parties had expressly agreed that the plaintiff would pay $25,000 for the leasehold interest and the defendant $75,000 for the land subject to the lease, the title to be taken in defendant's name, then, upon the consummation of the transfer, the defendant would undoubtedly hold title to the leasehold interest in trust for the plaintiff. This is in effect what the parties actually did, and the conclusion follows that the defendant holds title to the leasehold interest in trust for the plaintiff.

Id., 287 P. at 992.

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[36] *See also* 5 A. Scott *The Law of Trusts* §454.4 (3rd Ed. 1967).

As noted above, the record in this case indicates that Fennell and McMahon intended to retain an equitable interest of indeterminate duration. It is plain that they paid the *entire* option consideration. They also clearly intend to pay the *entire* purchase price. Villagomez paid nothing, and Aldan-Pierce is to pay nothing. This being so, the principle set forth in *Restatement (Second) of Trusts* §454 is inapplicable.

The resulting trust that has arisen in favor of Fennell and McMahon is thus not rebutted in part.[37] They have acquired an equitable interest of indeterminate duration in real property in the Commonwealth.

Agency-Trust

"An agency is not a trust." *Restatement (Second) of Trusts* §8.

> Agencies and trusts resemble each other in many respects, in that both are relations of trust and confidence, but their points of difference are marked. An agent is ordinarily not the owner of property for the benefit of his principal, while a trustee *always* holds the *title* to property for his cestui que trust.

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[37] We recognize that commentary to *Restatement (Second) of Trusts* §441 implies that it may be possible under some circumstances to limit a resulting trust to a leasehold interest despite the fact that a transferee acquiring legal title did not pay any of the purchase price. *Id.*, Comment f. (*See* illustrations 1 and 2 – limitation to resulting trust in life estate. We note that a life estate is a freehold interest.) We are unable to find any case authority on point. Regardless, if this common law principle applied in the NMI, Article XII would effectively be nullified. We cannot presume that Article XII "is a vain effort, or a nullity" and must interpret it to give it effect. *Ada v. Sablan*, No. 90-006, slip op. at 13, n.18 (N.M.I. Nov. 16, 1990), quoting *Levy v. Kimball*, 465 P.2d 580, 583 (Haw. 1970) (noting rule of statutory construction). Therefore, this principle does not apply in the NMI.

Kuck v. Sommers, 100 N.E.2d 68, 75 (Ohio Ct. App. 1950) (emphasis in the original). "An agent undertakes to act on behalf of his principal and subject to his control . . . a trustee as such is not subject to the control of the beneficiary, except that he is under a duty to deal with the trust property for his benefit in accordance with the terms of the trust and can be compelled by the beneficiary to perform his duty." *Restatement (Second) of Trusts* §8, Comment b.

On the other hand, "[o]ne who has title to property which he agrees to hold for the benefit and subject to the control of another is an agent-trustee and is subject to the rules of agency." *Restatement (Second) of Agency* §14B (1958). Aldan-Pierce is in the unusual position of occupying this dual relationship with Fennell and McMahon. *See Dixon, supra* (agent purchasing property in his own name with principal's money held property in trust for benefit of principal).

One duty imposed under the rules of agency applies to agents holding title:

> Unless otherwise agreed, an agent who holds the title to something for the principal is subject to a duty to the principal to use reasonable care in the protection of the title which he so holds, to act in accordance with the directions of the principal, to use it only for the principal's benefit, and to transfer it upon demand or upon the termination of the agency.

Id. §423.[38] As set forth below, elements of this duty are also required of a trustee of a resulting trust.

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[38] *See also Moon v. Phipps,* 411 P.2d 157 (Wash. 1966):

> Loyalty is the chief virtue required of an agent. . . . This loyalty demanded of an agent by the law creates a duty in

[footnote continued]

D. The Duty of the Trustee of a Resulting Trust

"The trustee of a resulting trust, like the trustee of an express trust, is in a fiduciary relation to the beneficiary." *Restatement (Second) of Trusts,* Introductory Note to Topic 1 at 326. "The trustee of a resulting trust . . . is ordinarily under a duty merely to convey the property to the beneficiary or in accordance with his directions." *Id.* at 325.

"A resulting trust . . . is always a passive or dry trust, a mere holding of the title for the benefit of another, as the law, in creating a resulting trust in any one who takes title without paying the consideration, never imposes on such grantee any duties or responsibilities as to its management or control or disposition, except . . . to reconvey to the cestui que trust or at his direction." *Shelton v. Harrison,* 167 S.W. 634, 638 (Mo. Ct. App. 1914).[39] However, the trustee is also "bound not to sell or incumber the property to the injury of the person for whose benefit the trust [is] presumed to arise." *Millograv v. Zacharias,* 165 P. 977, 978 (Cal. Dist. Ct. App. 1917).

Aldan-Pierce insists that she is under no duty to hold or dispose of title to the property subject to Fennell and McMahon's wishes. "Under our agreement, they

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the agent to deal with his principal's property solely for his principal's benefit in all matters connected with the agency.

411 P.2d at 161, citing *Restatement (Second) of Agency* §387.

[39] *See also Seabury v. Costello,* 26 Cal.Rptr. 248, 251 (Cal. Dist. Ct. App. 1962) ("[t]he duties of a resulting trust are not active; a resulting trustee merely holds legal title for the beneficiary and, at a proper time, is bound to make a proper conveyance"); *Laing v. Laubach,* 43 Cal.Rptr. 537, 539 (Cal. Dist. Ct. App. 1965) ("[t]he trustee has no duties to perform, no trust to administer, and no purpose to carry out except the single one of holding or conveying according to the beneficiary's demands").

receive a lease, but what I do with the title is my business." Aldan-Pierce Supplemental Affidavit. This is a misconception based on the assumption that a resulting trust in an equitable interest of indeterminate duration has not arisen. In fact, under the principles noted above, Aldan-Pierce is restricted in what she may do with title to the property. *Shelton, supra; Millograv, supra.*

"A resulting trust terminates if the legal title to the trust property and the entire beneficial [i.e. equitable] interest become united in one person." *Restatement (Second) of Trusts* §410.[40]

> If a trustee of a resulting trust transfers the trust property to the beneficiary or at his direction, the resulting trust terminates . . . If the beneficiary of a resulting trust has the entire beneficial interest in the trust property, he can at any time compel the trustee to transfer the trust property to him and thus terminate the resulting trust.

Id., Comment b.[41]

VII.

As noted above, Mafnas contends that Fennell and McMahon have acquired an equitable fee interest in the property through Villagomez. We agree.

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[40] "This result is a necessary consequence of the vesting of both legal and equitable titles in the beneficiary, because there is no longer any purpose in keeping the trust relationship alive." *Zakaessian v. Zakaessian,* 161 P.2d 677, 679 (Cal. Dist. Ct. App. 1945).

[41] Refusal on the part of a trustee of a resulting trust to reconvey title to the beneficiary is a breach of trust and gives the beneficiary a cause of action against the trustee. *Seabury, supra.*

A. Fennell and McMahon's Equitable Fee Interest

Villagomez acquired an equitable interest in the property when she exercised the option on July 6, 1985. *Phillips, supra.* As payors of the option consideration, Fennell and McMahon actually own this interest under a resulting trust. *McClellan, supra.*[42] Since Fennell and McMahon's equitable interest is of indeterminate (i.e., uncertain) duration it is a freehold interest.

If we were to affirm the trial court judgment compelling Mafnas to convey legal title, Aldan-Pierce would acquire only that: naked legal title. *Ohio State Life Ins. Co., supra.* Fennell and McMahon would continue to hold their freehold interest, with the right to compel Aldan-Pierce to convey legal title to them or to whomever they chose, at a time of their choosing. *Shelton, supra; Millograv, supra.*

Since Fennell and McMahon are not of Northern Marianas descent, their acquisition of a freehold interest in the property violated Article XII. The underlying transaction – the option executed on September 15, 1984 – is thus void *ab initio.* Article XII, §6.

B. The "Other Means" of Acquisition in Article XII

In this case, a freehold interest in Commonwealth real property was acquired by persons who are not of Northern Marianas descent through a trustee who is of such

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[42] The term "owner", as applied to real property, includes "any person who has an equitable right to, or interest in, land." 73 C.J.S. *Property* §25 (1983). "The equitable ownership is regarded in equity as the real ownership. The cestui que trust [trust beneficiary] is the beneficial and substantial owner, and, in the consideration of a court of equity, is actually seized of the freehold." *Illinois National Bank of Springfield v. Gwinn,* 61 N.E.2d 249, 254 (Ill. 1945).

descent. This is one of the "other means" of acquisition prohibited by Article XII, §2: "[t]he term acquisition . . . includes acquisition by sale, lease, gift, inheritance *or other means*." (Emphasis added.) The constitutional restriction would be undermined if persons who are not of Northern Marianas descent could acquire a prohibited interest via a trust relationship.[43] The only interests such persons are permitted to acquire are leaseholds of not more than fifty-five years. Article XII, §3. No other exceptions are permitted[44] to the restriction in Article XII, §1. "For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time." *State ex rel. O'Connell v. Slavin,* 452 P.2d 943, 946 (Wash. 1969) (additional exception to constitutional restriction not permitted).

If a resulting trust in real property in the Commonwealth has arisen in favor of a person who is not of Northern Marianas descent,[45] it is subject to being declared invalid in a judicial proceeding if the equitable interest held for them in trust violates Article XII.

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[43] *Cf. Seminar on the Law of Real Property Acquisition in Mexico,* 12 Ariz. L.R. 265, 285-86 (1970) (aliens unable to acquire title to real property in Mexico may acquire beneficial title in property through trust only upon approval of the Mexican government). This article was noted in Office of Transition Studies and Planning, *Briefing Papers for the Delegates to the Northern Marianas Constitutional Convention, Briefing Paper No. 12: Restrictions on Land Alientation* (1976).

[44] Apart from certain inheritence rights and transfers pursuant to a mortgage foreclosure. Article XII, §2, *See* part IV B, *infra.*

[45] We note that such a trust may be rebutted by clear evidence that the money used to purchase the property was a valid gift, loan, or payment to discharge a debt or other obligation. *Restatement (Second) of Trusts* §§445, 446, 447.

In this case, evidence supporting a constitutionally permissible trust is absent.

We are not saying that Aldan-Pierce – a person of Northern Marianas descent – may not legally acquire in her own name a "permanent or long-term interest[ ] in real property within the Commonwealth." Article XII, § 1. Rather, we are saying that Fennell and McMahon – persons who are not of Northern Marianas descent – may not acquire such interests indirectly through her or any other persons of Northern Marianas descent via a trust relationship.

We are not persuaded of the accuracy of Aldan-Pierce's claim that her agreement with Fennell and McMahon is an entrepreneurial partnership, whereby she provides "legal capacity" and Fennell and McMahon provide capital. The record does not support this contention. Even if we accepted it, we are not convinced that the framers of the NMI Constitution intended that acquisition of property under such an agreement would be permissible under Article XII.

We are, however, concerned with the possibility that a decision in favor of Mafnas may "unleash chaos into the Northern Marianas land title system and economy." Appellee's brief at 43.[46] We note that our ruling might pose problems for land title researchers, who must now ascertain whether a conveyance of the sort we rule invalid in this case has occurred in the chain of title of tracts of Commonwealth real property. An infirmity may not be immediately apparent in land records. We also note amicus' concern that our decision may create difficulties with respect to loans secured by real property, title to which may be constitutionally tainted.

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[46] Amicus makes a similar claim.

Though these difficulties are troublesome, they do not permit us to disregard the mandate of Article XII and permit the trust relationship that has arisen in this case to remain in force. "It is not for the court to engraft an exception where none is expressed in the [state] constitution, no matter how desirable or expedient such an exception might seem." *O'Connell,* 452 P.2d at 946. We are duty-bound to give effect to the intention of the framers of the NMI Constitution and the people adopting it. *Cobb v. State by Wantanabe,* 722 P.2d 1032 (Haw. 1986).[47]

VIII.

Based on the foregoing analysis, we hold that the exercist of the option at issue violated Article XII. Fennell and McMahon acquired a constitutionally impermissible interest in real property in the Commonwealth when the option was exercised on July 6, 1985. Accordingly, the underlying transaction became void *ab initio,* effective Septeber 15, 1984, when it was executed. Article XII, §6.

The Commonwealth Trial Court's summary judgment granting specific performance is REVERSED, and the case is REMANDED for entry of judgment in favor of Mafnas.[48]

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[47] Our interpretation of Article XII should be conclusive. *See, e.g., American Federation of Labor v. Watson,* 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946) (interpretation of state constitution by state courts conclusive in U.S. Supreme Court review).

[48] We note that if a property transaction is rendered void as violative of Article XII, an equitable remedy may be available to a possessor of property who constructed improvements under the good-faith (but erroneous) belief that they held clear title or a valid leasehold. *Repeki, supra.*

Entered this 5th day of July, 1991.

/s/ Jose S. Dela Cruz
JOSE S. DELA CRUZ, Chief Justice

/s/ Ramon G. Villagomez
RAMON G. VILLAGOMEZ, Associate Justice

/s/ Jesus C. Borja
JESUS C. BORJA, Associate Justice

APPENDIX B

[Filed February 18, 1992]

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

Appeal No. 90-047

Civil Action No. 86-796

DIANA C. FERREIRA,
Plaintiff/Appellant,

v.

ROSALIA MAFNAS BORJA, *et al.*,
Defendants/Appellees.

OPINION

Argued March 12, 1991

Counsel for Plaintiff/Appellant:
Carlsmith Ball Wichman
Murray Case Mukai & Ichiki
P.O. Box 241 CHRB
Saipan, MP 96950

Counsel for Defendants/Appellees:
Theodore R. Mitchell
P.O. Box 2020
Saipan, MP 96950

BEFORE: DELA CRUZ, Chief Justice, BORJA, Justice, and KING, Special Judge.

BORJA, Justice:

Diana C. Ferreira (hereafter Diana), a person of Northern Mariana Island descent (hereafter NMI descent), filed a quiet title action against defendants Rosalia Mafnas Borja, Isidora Mafnas Salas, and Isabel Mafnas Santos (hereafter Mafnas sisters). The Mafnas sisters were the sellers of three parcels of land to Diana. The lots are described as Lot Nos. 008 B 22, 23, and 24, containing a total area of 21,182 square meters, more or less. The Mafnas sisters filed an answer denying ownership in Diana and affirmatively stating that the acquisition of the land by Diana violated Article XII of the NMI Constitution.

Both parties filed motions for summary judgment. The trial court granted summary judgment in favor of the Mafnas sisters holding that the acquisition of the land by Diana violated Article XII of the NMI Constitution.

Diana appeals. We affirm the decision of the trial court.

FACTS

The series of transactions at issue in this case commenced with a 1980 Partnership Agreement (hereafter Agreement). James and Bobbi Grizzard (husband and wife) (hereafter the Grizzards) and Frank F. and Diana C. Ferreira (husband and wife) (hereafter the Ferreiras) executed this Agreement. The sole purpose of the partnership was to purchase "for sale, lease and development the property described above as part of Lot 008 B 10 . . . ." Agreement, Article One.[1]

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[1]The partnership agreement deals with only one piece of property. However, appellant's brief, at page 14, acknowledges [footnote continued]

The Grizzards would contribute $41,000 to the partnership. Frank F. Ferreira would contribute "all amounts needed for surveying, subdividing, legal fees, and accounting services to the partnership, such services being of the approximate amount of Nine Thousand Dollars ($9,000.00)." Agreement, Article Four.

In Article Four, also, it is provided that Diana,

> as a citizen of Northern Mariana descent will purchase the property described . . . with the $41,000 contributed by [the Grizzards]. Upon the purchase of the described real property, [Diana] will execute a lease of the real property to the partnership, for the maximum period of time allowed by law, being forty (40) years and to include a "change of law" provision for purchase in fee simple absolute should the law change with the consideration for this provision being the $41,000 paid in hand and the mutual promises contained in this agreement. In addition, the lease will contain a provision for the purchase of improvements put on the land by the lessee.

Diana acquired fee title but she never granted the partnership the short-term leases required by the Agreeement. Instead, Diana used additional funds from James Grizzard to acquire two additional adjacent parcels, taking fee title in herself. The three parcels were purchased for about one hundred thousand dollars ($100,000).

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that the other two properties were acquired using funds from the Grizzards. Appellant states also that Diana used the real estate expertise of Frank in acquiring the properties. While it may be true that she relied on Frank's expertise in the purchase of the properties, there is nothing in the record that indicates that Frank's expertise was part of the consideration accepted by the Mafnas sisters in conveying their interests. Consequently, such a fact is irrelevant as to the issue of who furnished the consideration for the purchase of the properties.

On March 25, 1988, in a document entitled, "Quitclaim, Release of Claims, and Assignment," Nansay Micronesia, Inc. acquired the Grizzards' interests in the three parcels of land, and all other rights they had under the Agreement. The consideration paid for all the Grizzards' interests was one million one hundred thousand dollars ($1,100,000). On the same day, Nansay Micronesia, Inc. assigned the interests it acquired from the Grizzards to the Ferreiras.

Also on March 25, 1988, Diana entered into an agreement to lease with Nansay for fifty-five years. The consideration for the agreement to lease was the assignment by Nansay Micronesia, Inc. of its interests in the three parcels of land and in the Agreement to the Ferreiras. Concurrently, Diana agreed to convey her fee simple interest in the three parcels of land to Ana Little for $60,000.

ISSUES PRESENTED

1. Whether the trial court committed reversible error in granting summary judgment in favor of the Mafnas sisters where the record before it presented multiple genuine issues as to material facts, by weighing conflicting evidence of record, resolving material factual disputes without trial and assessing the credibility of deposition evidence without having heard testimony.

2. Whether the trial court committed reversible error in concluding that the Grizzards and Frank Ferreira acquired a constitutionally impermissible interest in NMI land when Diana purchased the land from the Mafnas sisters.

3. Whether, as applied to this case, Article XII of the Constitution of the Northern Mariana Islands violates

Diana's right to equal protection of the laws as guaranteed her by the Fourteenth Amendment to the Constitution of the United States.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. If there is no genuine issue of material fact, the analysis shifts to whether the substantive law was correctly applied. *Commonwealth Ports Authority v. Hakubotan Saipan Enterprises, Inc.*, No. 90-005 (N.M.I. Aug. 8, 1991). If an incorrect substantive law was applied, the appellate court should, in its de novo review, determine if the result is correct under a different theory. *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985); 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure:* Civil 2d §2716 (1983). The evidence and inferences are viewed in a light most favorable to the non-moving party. *Cabrera v. Heirs of De Castro,* No. 89-018, 1 N.Mar.I. 102 (June 7, 1990).

ANALYSIS

Summary Judgment and Article XII

We will address the first two issues jointly since a discussion of one requires a discussion of the other.

Our analysis starts with the pertinent constitutional provision. Article XII, as amended in 1985, is as follows:

ARTICLE XII

Section 1: Alientation of Land.

The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2: Acquisition.

The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means.

Section 3: Permanent and Long-Term Interests in Real Property.

The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights . . . .

Section 4: Persons of Northern Marianas Descent.

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child or a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations.

A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors one-hundred percent of whom are persons of Northern Marianas descent and has voting shares (i.e. common or preferred) one-hundred percent of

> which are actually owned by persons of Northern Marianas descent as defined by Section 4. Minors, as defined by applicable laws of the Commonwealth, may not be eligible to become directors of a corporation. No trusts or voting by proxy by persons not of Northern Marianas descent may be permitted. Beneficial title shall not be severed from legal title.
>
> *Section 6: Enforcement.*
>
> Any transaction made in violation of section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under Section 5, a permanent or long-term interest in land in the Commonwealth acquired by the Corporation after the effective date of this amendment shall be immediately forfeited without right of redemption to the government of the Commonwealth . . . .

Commonwealth Code, vol. 1, pp. B-334 & B-335.

For a person to succeed in a cause of action alleging a violation of Article XII, certain material facts have to be clearly present and undisputed. These facts are:

1. An acquisition of NMI land;

2. The acquisition is a permanent and long-term interest;

3. The acquisition was made by a person who is not of NMI descent.

To determine if the above necessary facts exist in this case, we must answer the question of whether the long-term and permanent interest acquired by Diana from the Mafnas sisters in Lot Nos. 008 B 22, 23, and 24 was, as a matter of law, a constitutionally impermissible acquisition by the Grizzards.

The following facts appear from the record:

1. Diana is a person of NMI descent;

2. The partnership of the Grizzards, Frank Ferreira and Diana is not recognized in the constitution as a person capable of owning a permanent and long-term interest in Commonwealth real property;

3. The Grizzards and Frank Ferreira are not persons of NMI descent;

4. Diana acquired in her name the properties from the Mafnas sisters with funds provided entirely by the Grizzards; and

5. The properties were acquired in furtherance of a partnership agreement between the Grizzards and the Ferreiras, dated October 21, 1980.

The above facts are undisputed material facts. These undisputed material facts are sufficient for purposes of a summary judgment proceeding involving a claim that Article XII of the NMI Constitution was violated.

The disputed genuine issues of material fact that Diana claims with regard to "control" over an agent are not relevant. The issue of control was discussed by the trial court in its agency analysis. As we discuss later, common law principles of trust are dispositive. The other disputed issue of material fact raised by Diana deals with the claim of ownership to the properties. Again, as we will note later, Diana cannot raise a genuine issue of fact by refuting in her deposition what is stated in the Agreement.

As we stated earlier, where there is no genuine issue of material fact, the analysis then shifts to whether the correct substantive law was applied, bearing in mind that the evidence and inferences are viewed in a light most favor-

able to the non-moving party. *Cabrera v. Heirs of De Castro, supra.*

The trial court, in its grant of summary judgment, concluded that Diana's acquisition of Lot Nos. 008 B 22, 23, and 24 from the Mafnas sisters "violated Article XII, Section 1 of the Constitution and is void ab initio under Section 6 thereof." *Ferreira v. Borja,* C.A. No. 86-796, "Order Re Motion and Cross-Motion for Summary Judgment" at 28 (Super. Ct. Sept. 13, 1988). We initially examine this conclusion in view of the substantive law applied by the trial court. *Commonwealth Ports Authority v. Hakubotan Saipan Enterprises, Inc., supra.* If the incorrect substantive law was applied, we then must determine if the result is correct under a different theory of law. *Ross v. Communications Satellite Corp., supra;* 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil* 2d §2716 (1983).

The trial court applied principles of agency in arriving at its conclusion. Whether Diana is in fact an agent of the Grizzards and Frank is not dispositive. What is dispositive is whether Diana's acquisition of the properties, using funds provided entirely by the Grizzards, resulted in the acquisition by persons not of NMI descent of an impermissible interest in Commonwealth real property. The issue is whether the acquisition by Diana resulted in the acquisition by the Grizzards and Frank Ferreira of an equitable fee interest in Commonwealth real property and, therefore, the transactions violates Article XII.

The trial court erroneously applied agency principles in reaching its judgment. It is the law of trust that govern since only through trust principles may one acting as an agent acquire a fee interest. But although the

substantive law applied was incorrect, the judgment is correct. The result we reach in applying principles of trust is the same as the trial court's result in applying principles of agency.

An appellate court has an obligation to determine if the judgment or order of a trial court is correct even if the wrong ground or reasoning was used. *In re the Estate of Dela Cruz,* No. 90-023, slip op. at 13 n.10 (N.M.I. Feb. 7, 1991); *Ross v. Communications Satellite Corp., supra; Proctor v. State Farm Mut. Auto Ins. Co.,* 675 F.2d 308 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 839 (1982).

In *Restatement (Second) of Trusts* §440 (1959), it is stated that, "Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid, except as stated in §§441, 442, and 444." *See also Aldan-Pierce v. Mafnas,* No. 89-003, slip op. at 21 (N.M.I. July 5, 1991).

Is Diana a trustee for the Grizzards under a resulting trust theory? The answer is yes.

Disregarding the exceptions for the moment, what we have here is a transfer of three parcels of land to Diana with the entire purchase price being paid by the Grizzards. This creates a resulting trust under Section 440 of the *Restatement (Second) of Trusts* in favor of the one paying the purchase price. When Diana acquired the lots from the Mafnas sisters, Diana held bare legal title to the properties, and the Grizzards held equitable title. "The trustee of a resulting trust holds only the naked legal title for the benefit of the person furnishing the consideration . . . who holds the equitable interest." *Aldan-Pierce v. Mafnas, supra,* at 22. (Citation and footnote omitted.)

In *Aldan-Pierce v. Mafnas, supra,* we held that

> If a resulting trust in real property in the Commonwealth has arisen in favor of a person who is not of Northern Marianas descent, it is subject to being declared invalid in a judicial proceeding if the equitable interest held for them in trust violates Article XII.

Id. at 34. (Footnote omitted.)

The most crucial evidence against Diana is the partnership agreement. This document not only establishes that Diana was never meant to be the fee simple absolute owner of the properties, but also dispels any exception to a resulting trust.

The undisputed facts show that the partnership among the four was former to buy and sell or lease property. Each partner had a role. Diana was to purchase and hold title. The Grizzards were to provide the purchase money. Frank was to provide real estate expertise. Each performed their respective partnership roles.

The question is whether Diana possesses both legal and equitable titles to the properties, or whether she is holding title in trust for the benefit of all the four partners. If the latter, did the three partners not of NMI descent acquire an equitable fee simple interest in the properties? If so, such violates Article XII.

The Agreement clearly shows that Diana was to hold title to the properties for the benefit of the partnership. Agreement, Articles One and Four. There are three provisions in the Agreement that conclusively show that Diana was holding title for the benefit of the partnership. The first provision is in Article Four. It states that any lease agreement to the partnership must include a "change of law" provision. The article defines "change

of law" as meaning that the partnership (i.e., Diana, Frank, and the Grizzards collectively) will purchase the land in fee simple absolute should the law change with no addition consideration. Second, Article Four also states that Diana, or whoever is the lessor at the end of the lease period, must purchase the improvements placed on the land by the partnership, or whoever is the lessee then. And third, Article Five(3) provides that if Diana withdraws from the partnership for any reason, she must convey her right, title and interest in the land to a person of NMI descent, to be designated by the partnership.

These provisions establish an intent that Diana would obtain fee simple title, but subject to the partnership restrictions. She must convey her fee simple interest if 1) there is a change in the law, or 2) she decides to withdraw from the partnership. The consideration for her interest in the event of a change in law is the "mutual promises contained in this agreement." The consideration to be paid for her interest in the event she withdraws from the partnership "are the mutual promises contained in this agreement and one dollar ($1.00) to be paid in hand." She is restricted in what she may do with her title to the properties. And if none of the two conveyance possibilities arise, she must purchase the improvements placed on the premises by the lessee at the end of the lease term.

Diana, James Grizzard, and Frank Ferreira disputed, in their depositions, that Diana was to obtain anything less than a fee simple absolute interest. However, these refutations do not prohibit a court from granting summary judgment. *See United States v. Kasuboski,* 834 F.2d 1345 (7th Cir. 1987). A party cannot circumvent summary judgment by later refuting what he or she initially admitted.

This is not a situation where a party to the Agreement is attempting to clarify or explain an ambiguous provision in the Agreement. What we have is a situation where parties to the Agreement are attempting to dispute what is clearly and unambiguously stated in the Agreement. This cannot, and should not, be allowed. Otherwise, the rule for summary judgment would be meaningless.

In *Aldan-Pierce v. Mafnas, supra,* at 34, n. 45, we noted that, "a trust may be rebutted by clear evidence that the money used to purchase the property was a valid gift, loan, or payment to discharge a debt or other obligation." In this case, we have no such clear evidence. Article Four of the Agreement shows that Diana was not to obtain title as a gift or loan, or to discharge a debt or other obligation. She acquired title because she was a person of NMI descent. She acquired title with covenants that she will relinquish her title upon the happening of certain events. And if those specific events did not occur, her title was encumbered with the obligation to purchase any improvements placed on the premises by any lessee.

The exceptions to a resulting trust, as cited in *Restatement (Second) of Trusts* §440, do not apply. These exceptions arise if the payor: (1) manifests an intention that no trust should arise (§441), (2) purchases the property in the name of a relative "or other natural object of bounty" (§442), or (3) purchases the property to accomplish an illegal purpose (§444). *See also Aldan-Pierce v. Mafnas, supra,* at 23.

There is no manifestation of an intention that no trust should arise. The Agreement makes it clear that a trust was contemplated. Agreement, Articles Four and Five. Diana is to purchase the property and then lease it to the

partnership with a provision that if the law changes, the partnership obtains fee simple title at no additional consideration. She must purchase the improvements, if there is no change in the law, at the end of the lease term. Finally, she must transfer her interest if she ever decides to leave the partnership. It is clear that Diana's co-partners (who are not of NMI descent) have, through Diana's deed, acquired an equitable interest of indeterminate duration. This is not a situation where the non-NMI descent would be obtaining a constitutionally permissible interest. If the NMI descent was purchasing land with money totally provided by a non-NMI descent but it is clear that the intent in the transaction was that the non-NMI descent would only obtain a 55 year lease, or less, and the fee interest would be in the NMI descent, then the constitutional prohibition would not be violated.[2]

The Grizzards did not provide the funds for the purchase of the properties in the name of a relative or other natural object of bounty. Diana is not a relative of the

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[2] This hypothetical was also not the situation in the *Aldan-Pierce* case. We stated in *Aldan-Pierce* that "the record in this case indicates that Fennell and McMahon intended to retain an equitable interest of indeterminate duration." *Aldan-Pierce v. Mafnas, supra,* at 28.

We disagree with the dissent's interpretation regarding footnote 37 in *Aldan-Pierce. See, infra,* pp. 22-23. Footnote 37 was inserted under the discussion of a resulting trust being rebutted in part. Aldan-Pierce was arguing that, since Fennell and McMahon disclaimed any intention to take more than a leasehold for fifty-five years, the resulting trust is rebutted. Footnote 37 was inserted to show that the exception noted in Comment f of §441 of the *Restatement (Second) of Trusts* does not apply in the Commonwealth if the disclaimer occurs after the unconstitutional act. That is, a person cannot violate the constitution now, and then later attempt to correct the violation by saying that all that was intended was a constitutionally permissible interest.

Grizzards. There is nothing in the record establishing that she is a natural object of their bounty.

Aldan-Pierce v. Mafnas, supra, at 23-24, discussed the third exception, i.e., a purchase to accomplish an illegal purpose.

At first blush, it appears that this exception may be applicable in this case. If the partnership agreement was entered into to accomplish an illegal purpose, there can be no resulting trust under §444.

However, in analyzing Article XII, this Court has concluded in the *Aldan-Pierce* case that a violation of Article XII does not occur until and unless a court declares a transaction to be violative of Article XII. Therefore, there can be no automatic illegal purpose under Article XII. A court must first declare a transaction to be unconstitutional.

In adopting the principles set forth in *Isaacs v. De Hon,* 11 F.2d 943 (9th Cir. 1926), the *Aldan-Pierce* Court held that

> A resulting trust in real property in the Commonwealth in favor of a person who is not of Northern Marianas descent is valid, unless the equitable interest held for them in trust is declared, in a judicial proceeding, to be violative of Article XII. If the equitable interest is ruled violative of Article XII, the underlying transaction through which the person who is not of Northern Marianas descent acquired the interest becomes void *ab initio.* Article XII, §6.

(Footnote omitted.) We affirm such analysis and holding on this exception. Only a court of competent jurisdiction can determine if an acquisition of land violates Article XII of the NMI Constitution. Prior to such

judicial determination, the resulting trust is valid. This exception does not apply.

Equal Protection

Diana's argument on this issue must fall.[3] Her brief, at 58. n.47, correctly notes that this argument was made to the United States Court of Appeals for the Ninth Circuit and was rejected. *See Wabol v. Villacruisis,* 908 F.2d 411 (9th Cir. 1990).[4] There is no equal protection violation under the NMI Constitution, or the United States Constitution.

CONCLUSION

Based on the above, the conveyances from the Mafnas sisters to Diana violated Article XII of the NMI Constitution. The Grizzards acquired a constitutionally impermissible interest in real property in the Commonwealth when the conveyances were made. Such conveyances were void from the date they were executed.

The grant of summary judgment is hereby AFFIRMED.

/s/ Jose S. Dela Cruz
Jose S. Dela Cruz
Chief Justice

/s/ Jesus C. Borja
Jesus C. Borja
Justice

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[3] We disagree with the Mafnas sisters that this issue may not be raised on appeal since it was not raised in the trial court. This issue falls within one of the three exceptions noted in *Camacho v. Northern Marianas Retirement Fund,* No. 90-007, 1 N.Mar.I. 131 (Sept. 21, 1990). The exception is that "the issue is only one of law not relying on any factual record . . . ." *Id.* at 135-136.

[4] We note that we are agreeing only with the analysis of the Ninth Circuit on this issue.

KING, Special Judge (Dissenting):

I can readily agree with the Court's conclusion that some of the rights which James and Barbara Grizzard and Frank Ferreira sought to obtain in the San Roque land constituted permanent and long term interests in land. I accept also the majority's conclusion that the form of arrangement under which a person not of Northern Marianas descent (hereafter a "non-NMD") attempts to acquire control over, and a beneficial interest in, land in the Commonwealth is not dispositive. Thus, we are also in agreement that acquisition of any long term or permanent insterest, whether legal, equitable or contractual, and whether held individually or through ownership of some form of business enterprise such as a partnership or corporation, falls within the constitutional prohibition. I therefore concur that the transaction between the Grizzards, Frank Ferreira and Diana Ferreira was violative of article XII of the NMI Constitution and was void *ab initio*.

Despite these important agreements however, I have serious misgivings about the Court's use of the resulting trust doctrine in this context and I find the ultimate conclusion unnecessarily and dangerously disruptive of economic and private property interests in the NMI. Because of the importance of article XII to the people and jurisprudence of the NMI, my reasons are set out here fully.

I. The Resulting Trust Doctrine

The keystone of the Court's analysis in this opinion, and in the recent case of *Aldan-Pierce v. Mafnas*, No. 89-003 (N.M.I. July 5, 1991) is the resulting trust doctrine. For the following reasons, I do not believe this doctrine is being properly applied by the Court.

A. Nature and Purpose of the Doctrine.

The resulting trust doctrine is merely an analytic tool designed for the limited purpose of assisting courts to sort out the equities and relative rights between one who has furnished funds and one who holds the legal title as a result. G. Bogert, *Trusts* §170 (6th ed. 1987) (hereafter, "Bogert, *Trusts*").

The court's attempt here to use the doctrine for the wholly unfamiliar purposes of determining whether article XII of the Constitution of the NMI has been violated and for enforcing the constitutional prohibitions against the parties who have provided funds for the purchase of land necessarily rips the resulting trust doctrine from its moorings. The attempt therefore is inherently suspect.

B. Key Principles

Predictably, this novel effort has forced the Court to ignore or modify key aspects of the doctrine, and thereby to transmogrify the resulting trust doctrine itself.

1. A resulting trust is to be invoked for the one who pays – The resulting trust doctrine creates a trust "in favor of the person by whom the purchase price is paid . . . ." *Restatement (Second) of Trusts,* §440 (1959). Bogert, *Trusts* §35 at 128.

The Mafnas sisters did not pay the purchase price, but instead sold their property to Diana Ferreira and accepted payment from her. To permit sellers of land to invoke the resulting trust doctrine is unprecedented. To permit them to do so *against* the supposed beneficiaries of the doctrine in order to *deprive* those beneficiaries of any interest in the land they paid for, is a perverse misapplication of the doctrine.

2. **A resulting trust is not to be declared for an illegal purpose** – If the payment of funds and the agreement between the payor of the purchase price and the person who becomes the titleholder, are intended to accomplish an illegal or unconstitutional purpose, courts refuse to declare a resulting trust. *Restatement (Second) of Trusts* §444 (1959); Bogert, *Trusts* § §48 and 74.

If the Grizzards and Frank Ferreira were to have asked this Court to declare the existence of a resulting trust as against Diana Ferreira their attempt to obtain the "constitutionally impermissible interest," slip op. at 18. necessarily would have been rejected. Since the payors are barred, there is simply no basis for declaration of a resulting trust.

3. **Illegal purpose does not furnish standing to third parties** – Some courts have had occasion specifically to consider the relationship between the law of trusts and statutory or constitutional prohibitions against land ownership by certain persons. The general rule is that such a prohibition precludes equitable as well as legal interests. "If an alien has no capacity to take the legal title to land, he has no capacity to become beneficiary of a trust of land." *Restatement (Second) of Trusts* §119, comment b (1959).

The lone exception occurs in a few states in the United States when land acquired by aliens is subject to forfeiture to the state. In those states, if the circumstances are such "that a resulting trust would arise if the payor were not an alien, a resulting trust arises in favor of the alien, and his interest is subject to forfeiture to the State." *Restatement (Second) of Trusts* §444, comment f.

This limited right of the government to bring about forfeiture of an alien's claim through declaration of a resulting trust has not been extended to private parties. See Bogert, *Trusts* §74 at 268 n.10, *citing Kyodo Nishi v. Downung,* 21 Cal. App.2d 1, 67 P.2d 1057 (1937). *See also People v. Fujita,* 215 Cal. 166, 8 P.2d 1011 (1932).

Refusal to permit private parties to invoke a resulting trust to the detriment of the beneficiary of such a trust is based upon sound and long standing principles of equity.

> Equity will never raise a resulting trust in favor of an alien . . . . To raise the trust, thereby forfeit the estate, would be to commit the offense, and make the alien bear the penalty . . . . [E]quity will never raise a mere resulting trust for an alien, that it may be forfeited . . . it will not profess to benefit, when it designs to destroy.

Hubbard v. Goodwin, 3 Leigh (30 Va.) 492, 512 (1887). *See also Isaac v. Dehon,* 11 F.2d 943, 944 (9th Cir. 1926). ("If the plaintiffs are aliens, appellant is in no position to take advantage of this circumstance. No one but the sovereign has any right to complain of a trust in real estate in favor of an alien disqualified to hold title.")

4. Intention of parties must be considered – The resulting trust doctrine is an "intent enforcing" doctrine designed to uphold the actual intent of the parties. Bogert, *Trusts* §74 at 269. *See also Restatement (Second) of Trust* §441 (1959); *Id.,* comment f; *cf. Isaac v. Dahon,* 11 F.2d 943.

Yet, the Court in *Aldan-Pierce,* slip op. at 29, n.37, suggested that the resulting trust doctrine would apply in the NMI solely on the basis of the payment of the

purchase price by non-NMDs, regardless of the intentions of the parties.

5. **Limited reach.** – Since trust rights and obligations arise out of the relationships among the settlor, the trustees and the beneficiaries, the rights of third parties outside the trust normally are unaffected by the trust. Bogert, *Trusts* §§154 and 165. *See also Restatement (Second) of Trusts* §287 (1959). In this case, the Court uses the resulting trust doctrine in conjunction with the constitutional prohibition. This combination expands dramatically the impact of a resulting trust, apparently reaching the interests of subsequent bona fide purchasers who acquired the land from or through Diana Ferreira.

B. Logic and Analysis.

Inevitably, this effort to employ resulting trust analysis to determine the scope of article XII of the Constitution and to enforce the prohibitions has lured the Court into errors of logic and analysis, including circular reasoning[1] and unjustified adoption of legal fictions,[2] in addition to mere misuse of the resulting trust doctrine itself.

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[1] For example, the Court in *Aldan-Pierce* ostensibly was employing resulting trust analysis to determine whether the Constitution had been violated. Yet the basic principle that a resulting trust may be limited by agreement of the parties was swept aside on grounds of constitutional necessity. "Regardless, if this common law principle applied in the NMI, Article XII would effectively be nullified. We cannot presume that Article XII is a vain effort, or a nullity' and must interpret it to give it effect . . . . Therefore, this principal does not apply in the NMI." Slip op. at 28-29, n.37.

[2] "[A] violation of Article XII does not occur until and unless a court declares a transaction to be violative of Article XII. Therefore, there can be no automatic illegal purpose under Article XII. A court must first declare a transaction to be unconstitutional." Slip op. at 16.

The Court in *Aldan-Pierce,* slip op. at 29, n.37, said it would apply the doctrine without regard to the intentions of the parties. This would transform the constitutional prohibition, placing in peril any joint venture in which land is acquired by funds furnished by non-NMDs. A broad array of possible short term and temporary arrangements would be barred while other transactions identical in substance but different in form would be permitted. Such fixation on the form rather than substance of transactions would be, I submit, entirely artificial and would bear no relationship to the constitutional restrictions upon alienation or to their underlying purposes.

The majority opinion in this case indicates that the intentions of the parties will be considered. Slip op. at 14 and 15 n.2. This is a step in the right direction. Still, to do extent we do consider intention, the value of the resulting trust doctrine as a tool of analysis in article XII cases is diminished. Calling the rights of non-NMDs equitable interests by virtue of a resulting trust, rather than simply labeling them contractual rights, does not advance analysis. We are still faced with the difficult and exacting tasks of examining transactions on a case by case basis, defining with precision the scope of the article XII prohibitions, and determining whether the interests acquired by non-NMDs, be they legal or equitable title or be they contractual rights, are prohibited permanent or long term interests in Commonwealth land.[3]

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[3] Article XII, section 2 of the Constitution provides as follows: "The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or *other means.*" (Emphasis added).

Thus, the form of the acquisition and of the interest itself is not dispositive. This Court has noted that the term embraces

[footnote continued]

Properly applied, the resulting trust doctrine also is not an apt tool for article XII issues because it may easily be evaded. Parties may avoid the doctrine simply by agreeing expressly that no resulting trust will arise from their transaction or relationship or by casting the advance of funds for purchase of the land as a loan. *Restatement (Second) of Trusts* §441.

In essence the resulting trust doctrine as used here is a "red herring," which has diverted the Court's attention from the real issues and pertinent sources of law. A primary issue in this case is whether the particular transaction involving the Grizzards and the Ferreiras violates article XII of the NMI Constitution. Resolution of this issue should turn upon the language of article XII, the underlying constitutional policies, and the understanding of the parties.

Instead of focusing upon the sources of legal guidance established by the people of the Commonwealth of the Northern Mariana Islands however, and carefully considering the agreements among the parties, the Court has looked far back to an obscure doctrine of the law of trusts which emerged from the mists of midieval England.

Finally, perhaps the most damning criticism of the use of the resulting trust doctrine in this case is that it has caused the Court to disregard completely another critical issue. The Court has simply assumed, based upon its finding of a resulting trust, that the sale of land by the Mafnas sisters to Diana Ferreira is part of the transaction to be declared void. As discussed at greater length

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acquisition of equitable interests through trusts. *Aldan-Pierce*, slip op. at 17. The term also presumably includes contractual rights whereby a party acquires control over the use or disposition of land.

infra, pages 37 to 46, the meaning of the term "transaction" in article XII, section 6 of the Constitution is of far too great importance to constitutional jurisprudence in the NMI to be resolved without direct consideration.

II. Article XII of the Constitution of the NMI

Any governmental attempt, in a free society employing a free enterprise form of economic system, to prevent certain categories of persons from acquiring specified interests in land is inherently delicate and inevitably will present the court with complex issues. It would be futile here to attempt to provide a single solution which would purport to solve all of the problems that may arise.

However, there are certain key principles which should be kept in mind as the Court addresses article XII.

A. Key Principles

1. Full enforcement required – First, it is important to recognize that restrictions on the alienation of land have uniformly been regarded as crucial to the "culture and traditions of the people of the Northern Mariana Islands," to their protection "against exploitation" and "to promote their economic advancement and self-sufficiency." Covenant §805.

Section 805(a) of the Covenant for twenty-five years mandates, and thereafter authorizes, the government of the NMI to "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Marians Islands descent."

The delegates to the Northern Mariana Islands Constitutional Convention, in implementing section 805 of

the Covenant, made clear their own view that they regarded the restrictions as necessary –

> to protect the culture and traditions of the people of the Northern Mariana Islands, to promote the political growth needed in the first critical years of the Commonwealth, to accomplish the political union with the United States with a minimum of cultural and economic dislocation, and to provide the stability needed to survive in the family of nations.

Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands approved by the Delegates to the Northern Mariana Islands Constitutional Convention on December 6, 1976, at 164-65. Thus, this Court quite properly feels an obligation to accept and enforce the spirit of the constitutional prohibition against non-NMD acquisition of permanent and long-term interests in Commonwealth land. As the Court has said, the fact that "troublesome" difficulties may arise does "not permit us to disregard the mandate of Article XII." *Aldan-Pierce v. Mafnas,* slip op. at 36.

2. **Reconciliation necessary** – As we recognize the importance of article XII however, it is equally crucial to bear in mind that article XII is but one of numerous provisions, and must be reconciled with the other provisions, in the Constitution of the NMI. Nowhere is it written that article XII is to override any other part of the Constitution. Certainly there can be no suggestion that article XII, restricting the rights of NMDs to alienate land, should be read as overriding article I, the personal rights article of the Constitution.

Thus, we are presented with a claim that a particular transaction violates the restrictions on alienation and therefore is void *ab initio,* we must also remember that

"no person shall be deprived of . . . property without due process of law," NMI Const. art. I, §5, and that "no person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, . . . [or] ancestry . . . ." NMI Const. art. I, §6.

Obviously, there is a tension among these provisions. The right of a landowner to alienate his or her land, and the landowner's right to control the use of that land, are normally thought of as core rights of ownership protected under language such as that employed in the due process clause of article I.[4] Similarly, the rights to acquire, possess and alienate land have also been numbered among those basic rights which historically have been considered fundamental civil rights qualifying for equal protection.[5]

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[4]The Supreme Court of the United States has long recognized that owners of land are free to control, use, and alienate their interests. In *Sexton v. Wheaton*, 21 U.S. 229, 239, 5 L.Ed. 603, 607 (1823) Chief Justice Marshall said that "[i] t would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be firm and real, will be valid." That the right to alienate property is one of the rights an owner inherently possesses over property was again recognized in *Bean v. Patterson*, 122 U.S. 496, 30 L.Ed. 1126, 7 S.Ct. 1298 (1887).

More recently, the Eleventh Circuit Court of Appeals found that "the right to transfer possession of property is an important attribute of ownership" which is protected by the due process clause of the fifth and fourteenth amendments. *Peterman v. Coleman*, 764 F.2d 1416, 1419 (11th Cir. 1985).

[5]In *Cornfield v. Coryell*, Fed. cas. No. 3,230 (Cir. Ct. E.D. Pa. 1823), *quoted* in G. Stone, L. Seidmen, C. Sunstein and M. Tushnet, *Constitutional Law* 334 (1989), Justice Bushrod Washington, discussing the privileges and immunities clause of article

[footnote continued]

Our task of course must be to reconcile, and give effect to, both sets of provision. In doing so, we must recognize that the article XII restrictions on alienation inherently impinge upon the article I protections of due process and equal protection to purchase, lease, sell, hold and convey property. To the extent the article XII restrictions are expanded, the rights available under article I are commensurately reduced.

In light of this inherent tension and the necessity for careful reconciliation, article XII must be read cautiously and applied with precision so as to minimize the encroachment upon article I rights.

3. Least restrictive means of enforcement – In most free countries citizens take for granted the rights to buy and sell private land and to use that land as they choose so long as the form of use does not impinge upon the rights of neighbors or the general community. Valid reasons underlie article XII restrictions of these rights in the NMI. However, it should be understood that the restrictions themselves, precise and narrowly drawn, reflect no broader or deeper constitutional intent to render evil, suspect or improper, efforts to exercise whatever rights do remain outside the prohibitions.

IV of the United States Constitution, said that clause protects interests which are "fundamental; which belong, of right, to the citizens of all free government." These, he said, may all be comprehended under the following general heads: "Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may prescribe for the general good of the whole." Longstanding civil rights legislation in the United States also singles out the rights to buy and sell real property as core civil rights. "All citizens [shall] have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

Constitutional history confirms that we are to limit our enforcement role to the restrictions stated in the Constitution itself. The Analysis adopted by the Constitutional Convention in 1976 explains and emphasizes the thinking of the Convention that land in the NMI provides for the people of the NMI "unique social and economic benefits," which would be lost "if the land passes out of the hands of the people of the Northern Mariana Islands." *Analysis,* at 165. However, the Convention did not invite the Courts to set off on a wide-ranging search for the best specific ways to uphold the underlying purpose. To the contrary, the Analysis makes clear that the Convention saw the importance of accomplishing its goals in the least restrictive manner possible. The Convention was at pains to identify the specific restrictions in article XII: "[T]he Convention spent a great deal of time and effort to find the least restrictive means of accomplishing its purpose." *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands, supra,* at 166.

We are constitutionally bound, I submit, to respect the importance placed by the Convention upon its own work in spelling out the "least restrictive means" to carry out the constitutional purpose of preventing the land from passing out of the hands of the people of the Northern Mariana Islands. We must avoid the temptation to expand article XII beyond these "least restrictive means" identified by the framers.

In other words, while article XII prohibits non-NMD persons from acquiring leasehold rights extending more than fifty-five years, it does not prohibit, or even frown upon, a lease precisely fifty-five years in length. While the article prohibits non-NMDs from acquiring permanent and long-term interests in land it does not restrict NMDs

from conveying to non-NMDs lesser, nonfreehold interests in Commonwealth land or from permitting non-NMDs to exercise broad, almost complete control over land in the Commonwealth for shorter periods of time.

Moreover, nothing in the Constitution or in the constitutional history suggests that this Court is designated to ferret out and punish attempts by non-NMDs and NMDs to enter into transactions which we may perceive somehow as contrary to the spirit of article XII even though not actually prohibited by the language of the article.

Specifically, nothing in these sources of law hints of a constitutional directive that we should expand or modify other concepts, such as the resulting trust doctrine, and superimpose these altered doctrines over the article XII restrictions in order to outlaw arrangements which are not directly prohibited by article XII but which we believe should have been prohibited.

Finally, although the United States Court of Appeals for the Ninth Circuit has characterized the land alienation restrictions as a "paternalistic" attempt to prevent NMDs "from selling their cultural anchor for short-term economic gain,"[6] there is nothing to suggest that this Court is authorized to extend the reach of article XII to protect NMDs by setting aside transactions on the grounds that this Court sees no reason why a reasonable NMD who was not misled by a non-NMD would have entered into the agreement. Various common law doctrines protecting against undue influence, fraud or misrepresentation, and against enforcement of unconscionable contracts, are the proper tools for that kind of work.

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[6] *Wabol v. Villacrusis*, 908 F.2d 411, 423 (9th Cir. 1990).

B. A Proposed Mode of Enforcement for Article XII

Thus, our mandate is a narrow one. We are to declare void *ab initio* those transactions whereby a non-NMD acquires a permanent or long-term interest in real property. We may not do this by attempting to divine the "spirit" of the constitutional prohibition, Article XII is what it is and we must enforce it as it is.

The apparent way for the Court to do this would be to scrutinize carefully any transaction entered into by a non-NMD person to determine whether the transaction would result in acquisition of a long term interst by a non-NMD person, or in having the land pass out of the hands of the people of the NMI.

The obvious way to begin considering whether a transaction between NMDs and non-NMDs violates article XII is to examine any written agreements between the parties. If the agreement is a lease, for example, it seems clear that the term of the lease would be the primary, probably even the only, determinant. Normally, if the term of the lease is 55 years or less, the leasehold could not be violative of article XII.

Of course, it may often be necessary to extend analysis beyond the stated term of the lease. If, for example, the lease contains an option to renew or extend the lease beyond 55 years, or if it is agreed that title will vest in the lessee or pass out of the hands of NMDs in the event of some future contingency which is not within the control of the NMD, then presumably the agreement would be unconstitutional. Any "secret" agreements, whether oral or written, should be brought to light and included in the analysis of the transaction.[7]

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[7] Legislative adoption of disclosure requirements, mandating that any acquisition of an interest in land by a non-NMD be in

[footnote continued]

Because I agree with the majority that article XII, section 2 of the NMI Constitution means that the form of the interest is not dispositive, I interpret "permanent and long-term interests" as including the acquisition of any contractual or other legal interest, in whatever form, whereby a non-NMD, or the non-NMD's successor or agent, may control use of the land beyond fifty-five years. Similarly, any agreement whereby a non-NMD could extend the non-NMD's rights beyond fifty-five years, or pursuant to which an NMD would be stripped of the NMD's interest in the land, upon the occurrence of conditions subsequent which are outside the control of the NMD, or without independent assent by the NMD, would render the transaction violative of article XII.

Although I am persuaded, for the reasons already stated, that the resulting trust doctrine itself may not be used against the intended beneficiary of that doctrine as a means of enforcing article XII against that person, the Court may of course consider any aspect of the transaction, including the source of funds used to acquire the land in question.

Certainly the fact that a non-NMD provided funds for the purchase of land in the Commonwealth, title to which is placed in an NMD, is significant, although not conclusive, evidence that the non-NMD has attempted to acquire an interest in that land. If the non-NMD is shown to have supplied all, or nearly all, of the purchase price, this might even justify a rebuttable presumption that the non-NMD through this transaction with the NMD has attempted to acquire a permanent or long-term

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writing and registered in public records, could be of immense assistance to the enforcement effort. Establishment of a public enforcement agency to investigate and challenge questionable transactions could also be useful.

interest in the land so purchased. It would then be incumbent upon the non-NMD to show that this transaction is not violative of article XII.

C. The Proposed Method Applied to This Transaction.

Applying these principles to the factors identified in the majority opinion as showing "that Diana was to hold title to the properties for the benefit of the partnership," slip op. at 11, I have no difficulty in finding the transaction violative of article XII.

1. **The "change of law" provision** – Article four (1) of the 1980 partnership agreement provides as follows:

> Upon the purchase of the described real property, partner Diana C. Ferreira will execute a lease of the real property to the partnership, for the maximum period of time allows by law, being forty (40) years and to include a "change of law" provision for purchase in fee simple absolute should the law change with the consideration for this provision being the $41,000 paid in hand and the mutual promises contained in this agreement.

This change of law provision is an attempt by the non-NMD partnership presently to acquire the contractual right to receive a permanent freehold interest in the land, and to require the land to pass out of NMD hand, contingent only upon the happening of a future event which is outside of the control of the NMD. I would hold such a provision to be unconstitutional.

2. **Purchase of improvements** – The majority also points to the article IV requirement that Diana, or whoever is the lessor at the end of the lease period, must purchase the improvements placed on the land by the partnership, or whoever is the lessee then.

I am unable to perceive any constitutional difficulty with such a requirement. Indeed, since the NMD would retain title to the land at the end of the forty years, and would also become the owner of the improvements on the land at that time, I regard this provision as entirely consistent with the purposes of the Constitutional Convention in drafting of article XII.

3. **Withdrawal** – The third provision pointed to by the majority, article five (3), says that, "In the event Diana C. Ferreira desires to withdraw from the partnership for any reason, she hereby agrees to assign all her right, title and interest to the real property to a [NMD] who will be designated by the partners and selected as a new partner."

Although this is a closer question, I do not consider this provision to be unconstitutional. The NMD's promise to transfer her interest is itself limited to forty years and is enforceable only if she "desires," i.e. voluntarily decides, to withdraw from the partnership. Moreover, even after the transfer the title would remain in NMD hands. Therefore, I see no constitutional violation in this requirement.

4. **The quitclaim requirement** – There is one more provision, unmentioned in the majority opinion, which I see as unconstitutional. In article five (3) of the agreement the parties agree as follows:

> In the event the sale, lease or development of the first two lots is sufficient to generate enough income to pay all partners the amount of their initial capital investment the remaining three lots will be disposed of as follow: "J&B" will quitclaim all of their right title and interest in one lot to partners "F&D". "F&D" will quitclaim all their right, title and interest in one lot to "J&B" . . . .

This requires Diana, the NMD and sole titleholder of this land, to quitclaim her entire interest in the lot to "J & B" who are non-NMDs. A quitclaim deed executed by an NMD who is the sole titleholder of the land would effectively vest title in the non-NMD as against the entire world and would cause the land to pass out of the hands of all NMDs. Nobody, including the grantor, could challenge the non-NMD's claim of ownership. The quitclaim requirement is an immediate, fixed obligation, subject only to a condition which is not under the control of the NMD. This provision is therefore violative of article XII both because it is an attempt by non-NMDs to acquire a permanent interest in land and because it is an attempt to require the land to pass out of NMD hands, subject only to the happening of a future event which is outside the control of the NMD titleholder.

Thus, I agree with the majority that the agreement between the Grizzards and the Ferreiras is unconstitutional.

III. The Transaction To Be Voided

The majority suggests that the conclusion that the partnership agreement violates article XII requires a holding that "the conveyances from the Mafnas sisters to Diana . . . were void from the date they were executed." Slip op. at 17. Although this important aspect of the decision is not discussed in the majority opinion, the Court's holding presumably is based upon a view, or assumption, that the sale of land from the Mafnas sisters to Diana is the transaction, or part of the transaction, that must be declared void *ab initio* pursuant to article XII, section 6 of the Constitution.

Interpretation of the word "transaction" in section 6 is of grave importance to the implementation and impact of article XII. This crucial issue should not be decided without careful identification of the options available and consideration of the effects likely to flow from the interpretation selected. In *Aldan-Pierce,* this Court acknowledged that decisions under article XII could have a disruptive effect on land and business matters.

> We are . . . concerned with the possibility that a decision in favor of Mafnas may "unleash chaos into the Northern Marianas land title system and economy." Appellee's brief at 43. We note that our ruling might pose problems for land title researchers, who must now ascertain whether a conveyance of the sort we rule invalid in this case has occurred in the chain of title of tracts of Commonwealth real property. An infirmity may not be immediately apparent in land records. We also note amicus' concern that our decision may create difficulties with respect to loans secured by real property, title to which may be constitutionally tainted.

Id. at 35-36. In *Aldan-Pierce,* the Court correctly concluded that such difficulties "do not permit us to disregard the mandate of article XII." *Id.* at 36.

The plaintiff in *Aldan-Pierce* was seeking specific enforcement of an option agreement requiring an NMD to convey his land to the plaintiff. An action for specific performance is an equitable action and courts typically deny such relief if the requesting party comes into court with "unclean hands." D. Dobbs, *Remedies* §12.10 (1973). A refusal to grant specific performance flows naturally from the Court's conclusion that the parties seeking specific performance were attempting to obtain such relief in order to implement an unconstitutional

scheme. Given the finding of unconstitutionality, the Court's enforcement decision in *Aldan-Pierce* was indisputably correct and was uncontroversial.

More to the point, the Court's refusal to enforce the option in *Aldan-Pierce* did not pose any of the risks referred to by the Court in the language quoted above. Title to the land involved in that case already was in the name of the defendant, Mr. Mafnas, and the Court's refusal to force him to convey the land did not create any confusion in the land records.

Yet the Court's observation about potential dangers lurking in article XII, section 6 of the Constitution surely was correct. Some possible methods of enforcing article XII could indeed "unleash chaos" in the NMI. It is therefore incumbent upon us to approach enforcement issues with the utmost caution and balance.

In this case, the circumstances are quite different than in *Aldan-Pierce* and the potential for chaos is much greater. Here, we are not being asked to enforce article XII just by protecting an NMD from being forced to convey title, nor even just by divesting non-NMDs of their unconstitutional interests in land. Instead the Court contemplates stripping one NMD, Diana Ferreira, of her title to land in order to restore the previous ownership of other NMDs, who voluntarily sold the land at a mutually agreed price and without any knowledge of Diana's unconstitutional agreement with her non-NMD partners.

Moreover, the record indicates that the Grizzards and Ferreiras have already entered into agreements with third parties who have attempted to acquire interests in the land. Thus, this case itself may eventually serve to illustrate the inescapable truth that broad interpretations of the term "transaction" can inject untold confus-

ion into the land title system of the NMI. This is so in part because of the multiplier effect inherent in the broad interpretation itself. The broader the application of the term, the greater the number of agreements and actions to be declared void and set aside.

More than that however, this Court's adoption of an expansive interpretation of the term transaction would deprive the law of predictability. If the term is expanded to include agreements entered into by parties who have no reason to know that their apparently legal agreement is somehow related to an attempt by non-NMDs to acquire a prohibited interest in land, literally no person and no agreement will be secure.

In the instant case, perhaps the Court regards the agreements between the Mafnas sisters and Diana Ferreira as part of the "transaction" to be declared void on the theory that the deed to Diana Ferreira created a resulting trust in non-NMDs. The other possible theory is that the conveyance of land to Diana Ferreira was a necessary and integral part of the implementation of the Ferreira-Grizzard partnership agreement, and therefore, because of this close logical relationship, should be considered part of their transaction.

In any event, the salient point is that when they executed their deed, the Mafnas sisters apparently had no knowledge of the attempts of the non-NMDs to acquire interest in the land. There is no indication that they were aware of the existence of the partnership agreement between the Ferreiras and the Grizzards, and of course there is no showing that they knew of any of the specific provisions which rendered the agreement unconstitutional. To say, nonetheless, that they were part of the unconstitutional transaction is to take an extraordinarily expansive view of the term transaction.

Thus, what the Mafnas sisters entered into willingly and believed was a perfectly valid agreement has now been declared void by the Court. While the declaration of voidness apparently redounds to the benefit of the Mafnas sisters in this case, it should be remembered that the void *ab initio* provision can work both ways. Presumably, if the Mafnas sisters had negotiated an exceptionally good deal and if Diana Ferreira subsequently had decided she wanted to renounce the agreement, she could have had the sale of the land declared void under the same theory.

There is no apparent purpose to be served in exploring all of the possible results of such a broad interpretation of the term transaction. What is clear is that if this Court upholds a rule which permits the voiding of agreements entered into by persons who have no knowledge and no reason to know of the unconstitutionality of their agreements or indeed even of the possibility that the agreements are logically or practically related to the acquisition of a forbidden interest by a non-NMD, some persons may reap windfalls, and others may suffer catastrophic losses, while the courts and lawyers spend years and valuable resources trying to sort through the mess. All of this would happen arbitrarily. The results would not necessarily bear any relationship to the purity or illegality of the intentions of the parties when they enter into their respective agreements.

It is important to avoid such a situation. Instead, this Court must strive to establish a straightforward understandable interpretation of the term transaction and the interpretation must, insofar as possible, avoid injecting confusion into the great mass of business transactions entered into in the NMI.

In any normal sense, the transaction in this case which is unconstitutional must be only the partnership agreement whereby the non-NMD sought to acquire forbidden interests in land. It is only this agreement, I submit, which should be held void *ab initio*. Although the constitutional history is sparse, that which is available supports this way of interpreting the term transaction. The Analysis of the Constitution says, at page 178:

> This section provides that any transaction made in violation of section 1 is void from the beginning and has no force or effect. This means that if a person sells land to a [non-NMD], that transaction never takes effect and never has any consequences with respect to the title of the land. The title remains in the person who tried to sell it. . .

This Analysis confirms that in speaking of the "transaction," the Convention had in mind direct dealings between the non-NMD, and the NMD who "tried to sell" the land to the non-NMD. There was no indication that the term transaction was to include the NMD's ancillary or related dealings with other persons, who act without knowledge of the attempt of the non-NMD to acquire a forbidden interest.

It bears emphasizing that the example used in the Analysis does not say, or imply, that the NMD who "tried to sell" land to a non-NMD should be punished. The example reflects the convention's expectation that the title would be restored to the NMD who had dealt directly with the non-NMD. As the Court of Appeals for the Ninth Circuit noted in *Wabol,* article XII is paternalistic, not punitive. 908 F.2d at 423. The restraints on alienation are designed to protect, not punish NMDs, and this protection extends to, indeed has been erected

especially for, NMDs who enter into transactions with non-NMDs.

The goal of article XII is to preserve "unique social and economic benefits" flowing from land ownership by assuring that the land does not pass "out of the hands of the people of the Northern Mariana Islands." Analysis of the Constitution at 165. That purpose is fully served by declaring void the partnership agreement between Diana Ferreira and the non-NMDs. Plainly, we have no mandate from the framers to go to extraordinary lengths to assure that Diana Ferreira is punished and deprived of the benefit of her transaction with the Mafnas sisters, merely because that transaction bears a logical connection to Diana Ferreira's unconstitutional transaction with non-NMDs.

One last aspect demands consideration. This quiet title action originally was brought by Diana Ferreira in an effort to satisfy conditions posed to her by Nansay Micronesia, Inc. in connection with Nansay's lease of the land from her. Prior to entering into that agreement with Diana Ferreira, Nansay had paid $1.1 million to non-NMDs, the Grizzards, in exchange for their assignment to Nansay of their interests in the land and under the partnership agreement. Ultimately, it appears that Diana Ferreira, who invested nothing of her own in this transaction, is to receive in excess of $2 million. Of course, if this Court should declare all of the transactions, including the conveyances from the Mafnas sisters to Diana Ferreira, void *ab initio,* serious questions may be raised as to the right of Ms. Ferreira to receive that money.

On the other hand, if this Court declares only the partnership agreement between the Grizzards and the

Ferreiras to be void, it seems as though such a declaration will have little actual impact upon the parties involved here and the land will be used in ways and by persons unaffected by our ruling. There can, of course, be legitimate concern then that a ruling restricting the article XII, section 6 term transaction to the partnership agreement itself effectively renders the constitutional prohibition a nullity.

In my view, this concern is not well founded. It is important to bear in mind the limited purposes of article XII, to prevent the land of the Commonwealth from passing out of the hands of the people of the Northern Mariana Islands and to protect NMDs in their dealings concerning land with non-NMDs.

In this case, if we declare the partnership agreement void, we will have alerted non-NMDs and NMDs that they cannot rely upon or enforce any part of a transaction in which they know the non-NMD is attempting to acquire a permanent or long term interest in land in the Commonwealth.

Land would not pass out of the hands of the people of the Northern Mariana Islands as a result of such a decision. Finally, although Diana Ferreira is protected by the principle enumerated in article XII, section 6 and could at any time have renounce any aspect of the partnership agreement, her voluntary adherence to her commitments is not surprising. She has quite understandably concluded that she fared very well in this particular venture. Just as we are not designated to punish Diana Ferreira for entering into an agreement with non-NMDs, there is no occasion here for us to rush to her protection.

IV. Conclusion

The restrictions upon alienation specified in article XII of the NMI Constitution have been carefully designed to accomplish purposes of crucial importance to the people of this Commonwealth while minimizing disruption, and impingement upon other rights. These "least restrictive means," identified by the framers, must be fully and firmly enforced but we may not expand them in the name of judicial creativity. For all of the reasons stated, I believe this Court should eschew the resulting trust doctrine and fashion an analysis derived specifically from article XII and its constitutional history.

Nevertheless, in this particular case, I agree with my colleagues that the partnership agreement represents an attempt by a non-NMD to acquire an unconstitutional interest in land of the Commonwealth and is therefore void *ab initio*. However, I do not believe that this decision should have any bearing whatever upon the prior and separate agreement of the Mafnas sisters to sell their land to Diana Ferreira and I see no basis whereby their sale of land to her should be held void. I believe she should prevail in the quiet title action and I therefore respectfully dissent.

/s/ Edward C. King
EDWARD C. KING, Special Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15745

D.C. No. CV-90-00007-ARM

MATAO C. YOKENO,

Plaintiff-Appellee,

v.

RAMON C. MAFNAS,

Defendant-Appellant.

OPINION

Appeal from the United States District Court
for the Northern Mariana Islands
Alex R. Munson, District Judge, Presiding

Argued and Submitted March 11, 1992
Submission Deferred March 16, 1992
Resubmitted August 3, 1992
San Francisco, California

Filed August 28, 1992

Before: Robert Boochever, Robert R. Beezer, and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Boochever

SUMMARY

Civil Litigation and Procedure/Jurisdiction/Parties/Pleading/Real Estate/Litigation and Procedure (Civil)

Vacating a district court grant of summary judgment and remanding, the court of appeals held that subject matter jurisdiction could not be founded on the basis of the federal ques-

tion statute by the simple allegation in a complaint that the Constitution of the Commonwealth of the Northern Mariana Islands (CNMI), and the Covenant under which it was adopted, are violated in contravention of the U.S. Constitution by CNMI's regulation of the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent.

The CNMI Constitution restricts acquisition of certain interests in land—permanent freehold interests and leasehold interests exceeding fifty-five years—to persons of Northern Marianas descent. In this case, the property transactions in question represent an attempt to comply with the letter of the constitutional restriction by severing the freehold interest from the leasehold interest while giving the lessee power to designate a freehold grantee of CNMI descent. Appellee, Matao Yokeno, is Japanese and is the leaseholder of a 55-year lease in land located in CNMI, originally owned by appellant Ramon C. Mafnas. Yokeno brought an action in district court to quiet title to that leasehold interest. Mafnas moved to dismiss the complaint for lack of subject matter jurisdiction, failure to join an indispensable party, and federal abstention. The district court denied the motion, in part based on its conclusion that Yokeno's complaint raised a federal question conferring federal subject matter jurisdiction. On the parties cross-motions for summary judgment, the district court held that Yokeno was entitled to judgment, finding that the transactions involving the property fully complied with Article XII of the CNMI Constitution. However, three weeks after Yokeno filed suit in federal court, Mafnas filed his complaint, which he had previously furnished to Yokeno, in CNMI's Superior Court. Subsequently, Yokeno moved for summary judgment in Superior Court based on the res judicata effect of the federal court judgment. The superior court stayed the action pending Ninth Circuit resolution of this appeal. In attacking the district court's jurisdiction to entertain Yokeno's suit, Mafnas argued

that the complaint did not present a substantial federal question, and that diversity was collusively manufactured.

[1] Initially, the court disagreed with Yokeno's assertion that this case arose under federal law because his complaint alleged violations of the Covenant and of the United States Constitution. The court analyzes federal question jurisdiction with reference to the well-pleaded complaint rule. Examining Yokeno's complaint in light of that rule's guiding principles, the court concluded that the federal issues it raised are too remote and insubstantial to support subject matter jurisdiction. [2] Here, resolution of Yokeno's claim to superior title turned not on an interpretation of federal law, but rather on an interpretation of the CNMI common law and the CNMI Constitution. Because the federal law issues Yokeno raised were strictly anticipatory, a federal question did not appear on the face of his well-pleaded complaint. [3] In addition, the allegations that Article XII violates federal law were not substantial enough to support jurisdiction because they were facially meritless. First, Yokeno's claim that that article violated the U.S. Constitution is contradicted by the plain terms of section 805 of the Covenant exempting from constitutional requirements CNMI's restrictions on land alienation. [4] Second, Yokeno's claim that Article XII exceeds section 805's limited exemption from constitutional requirements, and thus violates the Covenant, was belied by the plain wording of both enactments. Accordingly, Yokeno's assertion did not present a colorable federal claim. [5] The court determined that the district court erred in concluding that it had subject matter jurisdiction under the federal question statute, because resolution of a substantial federal question is not necessary to adjudicate Yokeno's quiet title claim under CNMI law. Thus, subject matter jurisdiction, if it existed at all, had to be founded on diversity of citizenship, to which the court turned.

[6] Here, Nansay Micronesia is a CNMI corporation and Mafnas a CNMI citizen. While Yokeno is a Japanese citizen he is also a permanent U.S. resident domiciled in California.

Diversity of citizenship among the parties exists only by virtue of Nansay Micronesia's assignment of its interests in the property to Yokeno. Mafnas argued that the diversity-creating effect of the assignment was neutralized by the federal anti-collusion statute. In its order denying Mafnas' motion to dismiss, the district court declined to address the collusion issue because its resolution depended on facts that would be the subject of future discovery. [7] The district court thus had no occasion on summary judgment to revisit the question of whether diversity had been collusively manufactured. However, the factual assertions in the record raised a substantial issue concerning the collusiveness of the assignment, and thus whether the court had jurisdiction under the diversity statute. Because the district court did not make the factual findings necessary to a determination of collusion, the court remanded. In doing so, the court provided guidelines to assist the district court in making this determination. [8] Because of the heightened scrutiny called for in evaluating assignments by business organizations to subsidiaries or officers, the proffered business reason for the assignment must be evaluated in light of the totality of circumstances. [9] Here, because Yokeno is Nansay Micronesia's incorporator, director, president, and treasurer, Nansay's assignment of its interest in the property to Yokeno was presumptively collusive and ineffective to create diversity. [10] Thus, in deciding whether Yokeno has adequately rebutted the presumption of collusiveness, the district court has to delve deeper into the totality of circumstances surrounding the assignment. [11] Because a presumption of collusion did exist, that presumption was heightened where a federal jurisdictional motive is apparent for the assignment. [12] Thus, the district court should inquire into the adequacy of the consideration for the assignment, and whether the stated consideration actually changed hands from Yokeno to Nansay Micronesia. [13] The district court was also to consider whether Yokeno's five percent interest in Nansay Micronesia's parent company and his personal representation of Nansay in transactions concerning the property,

establish adequately the type of independent, preexisting interest indicative of a valid assignment. [14] In addition, the record contained no indication that Nansay expressly disavowed any continuing interest in the litigation or its proceeds.

COUNSEL

Jay H. Sorensen, Saipan, Commonwealth of the Northern Mariana Islands, for the defendant-appellant.

Stephen J. Nutting, White, Novo-Gradac & Thompson, Saipan, Commonwealth of the Northern Mariana Islands, for the plaintiff-appellee.

OPINION

BOOCHEVER, Circuit Judge:

Ramon Mafnas appeals the district court's entry of summary judgment against him in Matao Yokeno's action to quiet title to a leasehold interest in real property located on the island of Saipan, in the Commonwealth of the Northern Mariana Islands (CNMI or Commonwealth). We conclude that summary judgment was improper because the district court's subject matter jurisdiction over Yokeno's claim has not been established. Accordingly, we vacate the judgment and remand.

BACKGROUND

The underlying property dispute in this case centers on a provision of the CNMI Constitution which restricts acquisition of certain interests in land – permanent freehold interests and leasehold interests exceeding fifty-five years – to

persons of Northern Marianas descent. CNMI Const., art. XII, §§1, 3. The property transactions in question represent an attempt to comply with the letter of the constitutional restriction by severing the freehold interest from the leasehold interest while giving the lessee power to designate a freehold grantee of CNMI descent. The plaintiff, Matao Yokeno, is Japanese. He is the leaseholder of a 55-year lease in a parcel of land at San Roque, Saipan, originally owned by the defendant, Ramon Mafnas. Mafnas is of CNMI descent.

The series of conveyances and assignments in Yokeno's chain of title began in April 1980 when Mafnas entered into an exclusive agency listing agreement with Randall Fennell, a local attorney, to sell or lease the parcel. A month later, Mafnas executed a 40-year lease for a total of $75,000, plus interest, with Fennell and two other attorneys (the Fennell group), along with a separate agreement giving the lessee the power to designate a grantee of CNMI descent to whom Mafnas would convey the fee interest for $10.00. In December 1984, Mafnas conveyed the fee interest to Fennell's secretary Antonio Villagomez, who is of CNMI descent. In November 1985, Villagomez conveyed the fee interest to Marian Aldan-Pierce, a friend of Fennell's, who is also of CNMI descent.

In September 1987, the lessees and the fee holder together conveyed their interests to a new grantee and a new lessee under a purchase and lease agreement. Aldan-Pierce conveyed her fee interest to Ana Guerrero Little, who is of CNMI descent. The Fennell group assigned its remaining leasehold interest to Nansay Micronesia, Inc. (Nansay), a CNMI corporation and subsidiary of Nansay, Inc., a Japanese corporation. Yokeno, Nansay Micronesia's president and incorporator, represented the corporation in this transaction. The total price was $995,940, of which 98% was to be paid to the Fennell group for the leasehold interest and 2% to Aldan-Pierce for the fee interest. Shortly thereafter Little and Nansay Micronesia rescinded the original lease and entered into a new 55-year lease. At the same time Yokeno, on behalf of Nansay Micro-

nesia, executed a mortgage securing a promissory note for $597,564, with the Fennell group as mortgagee. The leased property was to become part of the site on which Nansay proposed to develop a beachfront hotel and condominium resort.

In March 1990, Mafnas notified Fennell and Nansay Micronesia of his intent to file suit to void the 1980 lease to the Fennell group and the 1984 conveyance to Villagomez, based in part on the CNMI Constitution's restrictions on land alienation. From March to May 1990, attorneys for the respective parties corresponded about the dispute, and Mafnas furnished Nansay with a draft copy of the complaint he intended to file in Commonwealth Superior Court. On May 13, 1990, Nansay Micronesia assigned its interest in the property to Yokeno. On May 22, 1990, Yokeno both recorded the assignment and filed a quiet title action against Mafnas in federal district court.

Mafnas moved to dismiss the complaint based on lack of subject matter jurisdiction, failure to join an indispensable party, and federal abstention. The district court denied the motion, in part based on its conclusion that Yokeno's complaint raised a federal question conferring federal subject matter jurisdiction. Mafnas then unsuccessfully petitioned this court for a writ of mandamus. In April 1991, on the parties' cross motions for summary judgment, the district court ruled that Yokeno was entitled to judgment, finding that the transactions involving the property fully complied with Article XII of the CNMI Constitution.

In June, 1990, approximately three weeks after Yokeno filed suit in federal court, Mafnas filed his complaint, which he had previously furnished to Yokeno, in Commonwealth Superior Court. In May 1991, Yokeno moved for summary judgment based on the res judicata effect of the federal court judgment. The superior court stayed the action pending our resolution of this appeal.

Mafnas timely appeals the federal district court's judgment. We have jurisdiction under 28 U.S.C. §1291 (1988), and we reverse and remand.

DISCUSSION

Mafnas bases his appeal on the grounds asserted in his motion to dismiss: lack of subject matter jurisdiction, failure to join an indispensable party, and federal abstention. He also attacks the district court's decision on the merits of Yokeno's claim, citing subsequent decisions of the CNMI Supreme Court voiding transactions in which non-CNMI lessees designated CNMI grantees and provided money for the conveyances, thus creating impermissible resulting trusts in persons not of CNMI descent.[1] Subject matter jurisdiction, however, is the threshold issue. As we discuss below, whether the district court had jurisdiction over Yokeno's complaint remains an open question, requiring remand. Until federal jurisdiction has been established, it would be inappropriate for us to address the remaining issues raised by this appeal.

Yokeno's complaint alleges two bases of federal jurisdiction: existence of a federal question, 28 U.S.C. §1331 (1988), and diversity of citizenship, 28 U.S.C. §1332 (1988). In attacking the district court's jurisdiction to entertain Yokeno's suit, Mafnas argues that the complaint does not present a substantial federal question and that diversity was collusively manufactured. The existence of subject matter jurisdiction is a question of law, and our review is *de novo*. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). We review the distrist court's findings of facts relevant to its determination of subject matter jurisdiction for clear error. *See Dweck v. Japan CBM Corp.*, 877 F.2d 790, 792 (9th Cir. 1989).

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[1] *Ferreira v. Borja*, No. 90-047 (N.M.I. Feb. 18, 1992); *Aldan-Pierce v. Mafnas*, No. 89-003 (N.M.I. July 5, 1991).

Federal Question Jurisdiction

Mafnas contests the district court's conclusion that Yokeno's complaint presents a case "arising under" federal law and that therefore it had subject matter jurisdiction under the federal question statute. *See generally* 28 U.S.C. §1331. At issue are the following allegations in Yokeno's complaint: "If Article XII [of the CNMI Constitution] . . . is construed to affect Plaintiff's leasehold interest . . . then Article XII is ultra vires, outside of the limited exception of Section 805 [of the Covenant establishing the CNMI as a commonwealth], and contrary to and in violation of Plaintiff's civil and constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution . . . to be free from discrimination based upon race, national origin, and association." Complaint at 4. Before analyzing whether Yokeno's complaint presents a substantial federal question, we put these allegations into context by briefly reviewing the relevant provisions of the CNMI Constitution and authorizing federal legislation.

Article XII of the CNMI Constitution provides that "[t]he acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent." CNMI Const., art XII, §1. The restricted interests include "freehold interests and leasehold interests of more than fifty-five years including renewal rights." *Id.* §3. Transactions made in violation of these constitutional provisions "shall be void ab initio." *Id.* §6. The CNMI Constitution was formulated and adopted pursuant to the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976), *reprinted as amended in* 48 U.S.C.A. §1681 note (West 1987) (the Covenant). Section 805 of the Covenant provides that, notwithstanding the United States Constitution and federal law, the CNMI government shall "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mari-

ana Islands descent." The Covenant declares that this restriction on property interests is warranted "in view of the importance of theownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency." Covenant §805.

[1] Yokeno asserts that this case arises under federal law because his complaint alleges violations of the Covenant and of the United States Constitution. We disagree, for our limited jurisdiction cannot be invoked so simplistically. We analyze federal question jurisdiction with reference to the well-pleaded complaint rule. *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 9-10 (1983) (citations omitted). "Under this rule, a complaint for coercive relief properly invokes federal jurisdiction where its well-pleaded allegations raise a substantial issue of federal law." *Mobil Oil Corp. v. City of Long Beach,* 772 F.2d 534, 538 (9th Cir. 1985). Where the plaintiff seeks coercive relief under state law, as in a quiet title action, a well-pleaded complaint presents a federal question if the plaintiff's right to such relief "necessarily turn[s] on some construction of federal law."[2] *See Franchise Tax Bd.,* 463 U.S. at 8-9. Where the federal element is alleged only "in anticipation of avoidance of

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[2]Mafnas analogizes this preemptive quiet title action to a declaratory judgment action, and urges us to look only to the defendant's threatened claim to determine whether it presents a federal question. This analogy, however, is inapt. In determining whether a declatory judgment action presents a federal question, we look either to the defendant's threatened action or to the plaintiff's claim, construed as a complaint for coercive relief. A common law quiet title action, such as that involved here, qualifies as a complaint for coercive relief. *See West 14th Street Comm'l. Corp. v. 5 West 14th Owners Corp.,* 815 F.2d 188, 195-96 (2d Cir.) (construing complaint for declatory relief as a coercive complaint to quiet title in order to determine existence of federal question), *certs. denied,* 484 U.S. 850 *and* 484 U.S. 871 (1987). Therefore, our inquiry is whether Yokeno's claim to superior title necessarily rests on resolution of a substantial federal issue.

defenses which it is thought the defendant may interpose," however, the complaint is not well-pleaded for purposes of subject matter jurisdiction. *See id.* at 10 (quoting *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914)). For example, a case does not arise under federal law if "the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise." *Id.* Moreover, jurisdiction under §1331 is unavailable where the federal claim "is patently without merit." *Brock v. Writers Guild of America, West, Inc.,* 762 F.2d 1349, 1352 n.3 (9th Cir. 1985) (citing *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 70-71 (1978)). Examining Yokeno's complaint in light of these guiding principles, we conclude that the federal issues it raises are too remote and insubstantial to support subject matter jurisdiction.

[2] In a quiet title action, each party must plead and prove his or her own claim to the property in question. *See, e.g., Hodges Transp., Inc. v. Nevada,* 562 F. Supp. 521, 522 (D. Nev. 1983); *see generally* 65 Am. Jur. 2d *Quieting Title* §§73-80 (1972).[3] The plaintiff's right to relief therefore depends on superiority of title. Yokeno's complaint indicates that his claim to superior title rests on two grounds: compliance of all transactions in his chain of title with Article XII of the CNMI Constitution, and his status as a bona fide purchaser. Compliance with Article XII and qualification as a bona fide purchaser are questions of CNMI law. The complaint alleges violations of federal law only as a counterdefense in anticipation of Mafnas' defense that under Article XII the original conveyances to the Fennell group and Villa-

[3]Under CNMI law, in the absence of written or local customary law to the contrary, the common law is applicable, as expressed in the restatements of the American Law Institute (A.L.I.) and to the extent not expressed in the restatements, as generally understood and applied by courts in the United States. 7 C.N.M.I. Code §3401 (1984). There is no Commonwealth quiet title statute, nor does the Restatement (Second) of Property deal with quiet title actions. We therefore look to general common law principles as applied by U.S. courts.

gomez are void.[4] Resolution of Yokeno's claim to superior title turns, therefore, not on an interpretation of federal law, but rather on an interpretation of the CNMI common law and the CNMI Constitution. Because the federal law issues Yokeno raises are strictly anticipatory, a federal question does not appear on the face of his well-pleaded complaint. *See Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 152 (1908) (complaint does not present a federal question if it "alleges some anticipated defense to [the plaintiff's] cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States."); *cf. American Invs-Co Countryside, Inc. v. Riverdale Bank,* 596 F.2d 211, 217 n.10 (7th Cir. 1979) (because nature of cloud on title is not an essential allegation of a state quiet title action, a well-pleaded complaint to quiet title does not raise a federal question where title to land is in doubt because of some matter of federal law) (dictum).

[3] Furthermore, the allegations that Article XII violates federal law are not substantial enough to support jurisdiction because they are facially meritless.[5] *See Brock,* 762 F.2d at 1352 n.3. First, Yokeno's claim that Article XII violates the United States Constitution is contradicted by the plain terms of section 805 of the Covenant, which exempt from constitutional requirements CNMI's restrictions on land alienation.

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[4]The strictly anticipatory manner in which these federal issues arise is reflected in the conditional language in which they are framed in the complaint: "*If* Article XII . . . is construed to affect Plaintiff's leasehold interest . . . *then* Article XII [violates federal law]." Complaint at 4 (emphasis added).

[5]In reaching this conclusion, we read Yokeno's complaint as alleging that Article XII facially violates the U.S. Constitution and the Covenant. Yokeno lacks standing to claim that Article XII as applied violates federal law, inasmuch as it has not yet been interpreted and applied to deprive him of a right protected by federal law. *See Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992) (to establish standing, plaintiff must have suffered a concrete and particularized injury in fact which is actual or imminent and not conjectural).

Moreover, in *Wabol v. Villacruisis*, 958 F.2d 1450 (9th Cir. 1992), *amending and superseding* 898 F.2d 1381 (9th Cir. 1990), we upheld the validity of section 805. We concluded there that Congress was within its power to enact this exemption from constitutional requirements. *Id.* at 1459-62. Yokeno's constitutional attack on Article XII is thus foreclosed both by the terms of section 805 and our circuit precedent.

[4] Second, Yokeno's claim that Article XII exceeds section 805's limited exemption from constitutional requirements, and thus violates the Covenant, is belied by the plain wording of both enactments. Section 805 contains a broad grant of authority to the Commonwealth government to "regulate the alienation of permanent and long-term interests in real property" so as to restrict their acquisition to persons of CNMI descent. Covenant §805(a). Section 805's constitutional exemption is limited to the regulations adopted pursuant to this grant of authority. Section 805, however, leaves to the Commonwealth government the decision over what types of long-term interests to restrict and therefore over which restrictions are insulated from constitutional attack. *See, e.g., Wabol*, 958 F.2d at 1462 (upholding Article XII's previous restrictions on leaseholds exceeding 40 years). Moreover, we have upheld the enforcement provision of Article XII, which declares any transaction violating its terms "void ab initio," as within section 805's legislative grant of authority. *Id.* at 1462-63. Accordingly, Yokeno's assertion that Article XII violates the Covenant does not present a colorable federal claim.

[5] To summarize, the district court erred in concluding that it had subject matter jurisdiction under the federal question statute, because resolution of a substantial federal question is not necessary to adjudicate Yokeno's quiet title claim under CNMI law. Subject matter jurisdiction, if it exists at all, must therefore be founded on diversity of citizenship, an issue to which we now turn.

Diversity Jurisdiction

[6] Nansay Micronesia is a CNMI corporation and Mafnas a CNMI citizen. Yokeno is a Japanese citizen and a permanent United States resident, domiciled in California. Diversity of citizenship among the parties, therefore, exists only by virtue of Nansay Micronesia's assignment of its interests in the property to Yokeno. In his motion to dismiss, Mafnas argued that the diversity-creating effect of the assignment was neutralized by the federal anti-collusion statute, which states: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. §1359 (1988). In its order denying Mafnas' motion to dismiss, the district court declined to address the collusion issue because its resolution depended on facts which would be the subject of future discovery. Rather, the court found that subject matter jurisdiction existed under the federal question statute, 28 U.S.C. §1331.

[7] The court thus had no occasion on summary judgment to revisit the question of whether diversity had been collusively manufactured. That question, however, is now potentially dispositive in light of our conclusion that the federal law allegations in Yokeno's complaint do not support jurisdiction under the federal question statute. The factual assertions in the record raise a substantial issue concerning the collusiveness of the assignment, and thus whether the court had jurisdiction under the diversity statute. Because the district court has not made the factual findings necessary to a determination of collusion, we must remand. We provide the following guidelines to assist the district court in making this determination.

The federal anti-collusion statute is aimed at preventing parties from manufacturing diversity jurisdiction to inappropriately channel ordinary business litigation into the federal courts. *See Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828-29 (1969). Certain kinds of diversity-creating assign-

ments warrant particularly close scrutiny. Assignments between parent companies and subsidiaries, and assignments by corporations to their officers or directors " 'are presumptively ineffective to create diversity jurisdiction.' " *Dweck v. Japan CBM Corp.*, 877 F.2d 790, 792 (9th Cir. 1989) (quoting *Simpson v. Alaska State Comm'n for Human Rights*, 608 F.2d 1171, 1174 (9th Cir. 1979)); *see also Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 475 (2d Cir. 1976). To overcome this presumption, the party asserting diversity must show a legitimate business reason for the transfer. *See Dweck*, 877 F.2d at 792. Simply articulating a business reason is insufficient; the burden of proof is with the party asserting diversity to establish that the reason is legitimate and not pretextual. *See id.* In *Dweck*, for example, we rejected the plaintiff's justification that a corporation's assignment of a claim to its director merely reflected his preexisting financial interest in the disputed contract. We concluded that the assignment was collusive because it was not supported by consideration and because the plaintiff had not shown that the assignor "expressly disavowed any continuing interest in the litigation or its proceeds." *Id.* at 793.

[8] These two factors were dispositive in *Dweck*, yet other factors may be relevant as well. Because of the heightened scrutiny called for in evaluating assignments by business organizations to subsidiaries or officers, the proffered business reason for the assignment must be evaluated in light of the totality of circumstances. Relevant in this inquiry are factors such as the timing of the assignment, the purpose and underlying motivation for the assignment, and the assignee's preexisting interest in the claim. *See, e.g., Prudential Oil*, 546 F.2d at 476-77 (considering continued involvement of parent company personnel in litigation, parent's contemplation of instituting lawsuit prior to assignment, and advantages of gaining federal forum); *Haskin v. Corporacion Insular de Seguros*, 666 F. Supp. 349, 354-56 (D.P.R. 1987) (considering assignee's preexisting independent interest in claim, assignor's continued interest in litigation, financing of litiga-

tion by assignee, and motivation for assignment); *see also Steele v. Hartford Fire Ins. Co.*, 788 F.2d 441, 444 (7th Cir. 1986) (Posner, J.) (suggesting that, unless an "assignment probably would have been made even without a jurisdictional motive," motive should be examined) (dictum); *cf.* 14 Wright, Miller & Cooper, *Federal Practice & Procedure* §3639, at 114-16 (2d ed. 1985) (relevance of motive in collusion analysis is "somewhat undecided," although some courts have considered it "an important factor in determining whether the policies of Section 1359 have been violated").

[9] Yokeno is Nansay Micronesia's incorporator, director, president, and treasurer. Nansay's assignment of its interest in the property to Yokeno is, therefore, presumptively collusive and ineffective to create diversity. In an affidavit submitted in the summary judgment proceedings, Yokeno asserted that the purpose of the assignment was to make Nansay's development project more attractive to investors by removing clouded property interests from Nansay's portfolio. On appeal, Yokeno argues that the legitimacy of this business reason is shown by the consideration he paid, which is recited in the written assignment document, and by his preexisting interest in the property, which stems from his shareholder interest in Nansay's parent corporation and his active role in negotiating and executing the property transactions in question.

[10] Although there is some superficial appeal to these arguments, in deciding whether Yokeno has adequately rebutted the presumption of collusiveness, the district court must delve deeper into the totality of circumstances surrounding the assignment, including the following. In support of his motion to dismiss for lack of jurisdiction, Mafnas submitted evidence that he had, several months before the assignment, informed Nansay that he was planning to file a quiet title action in Commonwealth Superior Court and had furnished Nansay with a copy of the complaint. This evidence also shows that after unsuccessful settlement discussions, Nansay assigned its interests to Yokeno, who almost simultaneously filed a pre-

emptive quiet title action in federal court. We take particular note of Yokeno's statement at oral argument before this court that an "alternative motive" for the assignment was to gain a federal forum where he could obtain a speedier resolution than in the CNMI courts.

[11] This evidence casts doubt on the legitimacy of the business reason advanced by Yokeno. It is possible that a business reason also contributed to the decision to assign the leasehold to Yokeno. In cases where a presumption of collusiveness does not exist, the existence of such dual motives would not render the assignment ineffective for diversity purposes. *See U.S.I. Properties Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 6 (1st Cir. 1988) (although "parties may legitimately try to obtain the jurisdiction of federal courts" through lawful means, using a strawman "solely for the creation of otherwise unobtainable jurisdiction" is forbidden by statute), *cert. denied*, 490 U.S. 1065 (1989); *cf. Steele*, 788 F.2d at 444 (suggesting that otherwise valid assignment is nevertheless collusive if sole purpose is to gain federal forum). This case is different, however, because a presumption of collusion does exist. That presumption is heightened where a jurisdictional motive is apparent. To overcome this heightened presumption, the party asserting diversity must show more than simply a colorable or plausible business reason. The business reason must be sufficiently compelling that the assignment would have been made absent the purpose of gaining a federal forum. Where a jurisdictional motive is apparent in assignments between corporations and their subsidiaries or officers, the probability of collusion is simply too great to require a lesser showing.

[12] Justifying an assignment as an attempt to increase the assignor's financial attractiveness by removing a disputed claim from the books, while a factual question to be considered, does not necessarily overcome the presumption of collusiveness. Nor do we find the recital of consideration in the lease assignment, without more, sufficient to establish that

business concerns were an independent reason for the assignment. *See Hayden v. Manning,* 106 U.S. 586, 587-88 (1883) (court lacked diversity jurisdiction because although valuable consideration was recited in land conveyance, there was no evidence that money was ever paid or that note, mortgage or other security was ever given). Thus, the district court should inquire into the adequacy of the consideration and whether the stated consideration actually changed hands from Yokeno to Nansay Micronesia. The record presently contains no evidence, other than the written assignment signed by Yokeno as both assignee and on behalf of the assignor, to establish that Yokeno actually paid Nansay $100,000 for the assignment or that he legally obligated himself to do so.

[13] The district court should also consider whether Yokeno's five percent interest in Nansay Micronesia's parent company and his personal representation of Nansay in transactions concerning the property, establish adequately the type of independent, preexisting interest indicative of a valid assignment. *Cf. Dweck,* 877 F.2d at 793 (fact that assignee had signed disputed contract did not establish his preexisting interest in claim because assignee had signed contract as an officer of assignor, and not in his individual capacity).

[14] Finally, the record contains no indication that Nansay has "expressly disavowed any continuing interest in the litigation or its proceeds." *Id.* Given the parcel's location as an integral part of a larger tract of land slated for Nansay's hotel development, the logical inference is that if Yokeno is successful in the litigation, the leasehold will be transferred back to Nansay so that the development can proceed as planned. Notably, Yokeno admitted at oral argument on appeal that he would be free to transfer the leasehold back to Nansay in such an event. Disposing of a clouded property interest to increase financial attractiveness is not a legitimate business purpose that would overcome the presumption of collusiveness if, once the cloud is removed, the assignor stands to reap the benefits of the assignee's success.

Because the district court has not yet had the opportunity to make the factual findings necessary to determine whether Yokeno has overcome the strong presumption of collusiveness attending the circumstances of the assignment, we remand for further proceedings in which the court shall determine whether diversity jurisdiction exists. If the court determines it has diversity jurisdiction, it may reconsider its abstention decision in view of our holding that Yokeno's complaint does not present a substantial federal question.

CONCLUSION

We conclude that subject matter jurisdiction cannot be founded on the federal question statute, and REVERSE the district court's holding to the contrary. We VACATE the judgment and REMAND for a determination whether the federal anti-collusion statute applies to the facts of this case to bar diversity jurisdiction as well. If the court finds that it has diversity jurisdiction, it may reconsider its prior abstention decision in light of the absence of a federal question. This panel shall retain jurisdiction over any appeal from the district court's decision.

APPENDIX D

NORTHERN MARIANA ISLANDS

HEARING
BEFORE THE
COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
UNITED STATES SENATE
NINETY-FOURTH CONGRESS
FIRST SESSION
ON

S.J. Res. 107

JOINT RESOLUTION TO APPROVE THE "COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA", AND FOR OTHER PURPOSES

JULY 24, 1975

[SEAL]

Printed for the use of the
Committee on Interior and Insular Affairs

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MEMORANDUM FOR:

The Chairman, Marianas Political Status Commission

The President's Personal Representative for Micronesian Status Negotiations

SUBJECT:

Report of the Joint Drafting Committee on the Negotiating History

Pursuant to decision taken in December during the fifth series of negotiations in Saipan on the future political status of the Marianas, the joint Marianas-United States Drafting Committee has met and has undertaken to record the intention of the parties regarding certain provisions of the Covenant. We submit our report herewith.

The results of our discussions are reflected in the attached draft negotiating history which is recommended by the Joint Drafting Committee for your consideration. The draft serves to set out our tentative agreement on a number of substantive matters. We recommend that it be approved by both delegations and incorporated into the official record.

/s/Howard P. Willens
Howard P. Willens
Counsel
Marianas Political
Status Commission

/s/James M. Wilson, Jr.
James M. Wilson, Jr.
United States
Deputy Representative

Approved by the delegations of the Northern Mariana Islands and the United States on February fifteenth, 1975.

/s/ Edward DLG. Pangelinian
Edward DLG. Pangelinian
Chairman
Marianas Political
Status Commission

/s/ F. Haydn Williams
Ambassador F. Haydn Williams
The President's Personal
Representative for
Micronesian Status Negotiations

REPORT OF THE DRAFTING COMMITTEE

Section 101. Inasmuch as the definition of the term "Northern Mariana Islands" in Subsection 1005(b) is incorporated in Article I, it is understood that the geographic integrity of the Northern Mariana Islands is subject to the mutual consent requirement of Section 105.

Section 103. The Government of the Northern Mariana Islands will not be considered an agency or instrumentality of the United States Government.

Section 104. Reference to the federal powers mentioned in this Section is not intended to derogate from the sovereignty vested in the United States by Section 101 or the legislative powers vested in the United States by Section 105.

Section 105. It is intended that prior to the termination of the Trusteeship Agreement the consent of the Northern Mariana Islands envisaged by this Section may not be given without the consent of the popularly elected legislature. It is understood that the authority of the United States under this Section will be exercised through, among other provisions of the United States Constitution, Article IV, Section 3, Clause 2.

Section 202. The authority of the federal courts to determine whether or not the Constitution of the Northern

Mariana Islands and subsequent amendments thereto are consistent with the provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands is not intended to be exclusive so as to preempt the power of the courts of the Northern Mariana Islands to make such determinations in appropriate cases.

Section 203(c). It is the intention of the parties that the provision stating that the legislative powers of the Northern Mariana Islands will extend "to all rightful subjects of legislation" be broadly interpreted, consistent with Section 102, to mean that the power of the legislature will be limited only by the terms of the Covenant, the provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, and the Constitution of the Northern Mariana Islands.

It is also the intention of the parties, as reflected in the unanimous view of the members of the Marianas Political Status Commission, that the Northern Mariaia Islands Constitution provide for a distribution of the membership of one house of the legislature on the basis of appropriate considerations in addition to population and in particular that the phrase "chartered municipalities of the Northern Mariana Islands" be interpreted to mean the present chartered municipalities of Rota, Saipan and Tinian as constituted at the time of signature of this Covenant and any additional future chartered municipalities that may be added pursuant to the terms of the Constitution of the Northern Mariana Islands.

Section 401. The establishment of a district court for the Northern Mariana Islands does not preclude the appointment of the District Judge, United States Attorney and United States Marshal for Guam to hold the corresponding offices in the Northern Mariana Islands at the same

time. The United States Congress, in its discretion, may also provide that the United States Attorney and the United States Marshal for the Northern Mariana Islands are authorized or required to perform, at the request of the Government of the Northern Mariana Islands, certain functions related to the execution of the local laws.

Subsection 402(c). It is the intention of the parties with respect to this Subsection that the Legislature of the Northern Mariana Islands be under no obligation to grant any appellate jurisdiction to the District Court for the Northern Mariana Islands. The Legislature may choose at any time and from time to time to establish appellate court of the Northern Mariana Islands and to eliminate or reinstate the appellate jurisdiction of the District Court.

Subsection 501(a). This Subsection is intended, among other things, to extend to the people of the Northern Mariana Islands the basic rights of United States citizenship and to make applicable to them certain of the constitutional provisions governing the relationship between the federal government and the States, as if the Northern Mariana Islands were a State. As reflected in this Subsection the parties recognize that certain provisions of the Constitution of the United States will apply to the Northern Mariana Islands of their own force by virtue of Article I of this Covenant.

The inclusion or omission of the power to legislate in the specific reference to certain provisions of the Constitution of the United States is not designed to affect the authority of the United States to legislate with respect to the Northern Mariana Islands. That power is governed by Article I.

Subsection 501(b). The provisions of the Covenant referred to in this Subsection constitute integral parts of the mutual compromises and concessions without which the accession of the Northern Mariana Islands to the United States would not have been possible. The inclusion of any of those provisions in this Subsection should not imply that these provisions are in conflict with the Constitution of the United States.

Section 502. The interim formula stated in this Section is not intended to be the exclusive method by which laws of the United States are or can be made applicable to the Northern Mariana Islands. The Congress of the United States will have power subject to Section 105 to alter the manner and extent to which laws covered by the formula apply to the Northern Mariana Islands, to make laws not covered by the formula applicable or to make laws covered by the formula inapplicable. The formula does not make the Northern Mariana Islands into a territory or possession of the United States prior to termination. In many instances, however, the Northern Mariana Islands will be treated as if it were a territory or possession of the United States prior to termination, for many laws applicable to Guam because it is a territory or possession will become applicable to the Northern Mariana Islands.

The phrase "applicable to Guam" or "applicable to the Trust Territory of the Pacific Islands" in this Section is to mean "applicable within" as well as "with respect to" the geographic areas mentioned or the people who reside in or who are citizens of those geographic areas.

The term "the federal banking laws" in Subsection (a) has particular reference to Sections 13, 25 and 25(a) of the Federal Reserve Act, as amended (12 U.S.C. 466, and 601-632, respectively) and Section 5191 of the

Revised Statutes (12 U.S.C. 143). The reference to the Micronesian Claims Act in Subsection (a) is not intended to preclude the Northern Mariana Islands from seeking such amendments to the Act, or increased appropriations for its implementation, as appear appropriate or desirable.

Subsection 503(a). It is understood that the laws of the Trust Territory of the Pacific Islands as modified by the Government of the Northern Mariana Islands pursuant to its authority, which relate to the subjects addressed in this Subsection, will continue to be effective after termination of the Trusteeship Agreement, except to the extent that they are modified by federal law after termination or by the Government of the Northern Mariana Islands.

Section 504. The provision that the United States will bear the cost for the work of the Commission does not mean that the United States will pay the salary of the four Commissioners who are domiciled in the Northern Mariana Islands.

Section 506. To the extent that the United States law does not apply, the Northern Mariana Islands has the power over immigration into its territory. An immediate relative of a United States citizen residing in the Northern Mariana Islands may gain admission to the Northern Mariana Islands in accordance with local law without claiming at that time entitlement to immediate relative status under the United States Immigration and Nationality Act.

Section 601. The revenue provisions of the Covenant are not designed to render the Federal Unemployment Tax and the benefits derived therefrom applicable to the Northern Mariana Islands.

Subsection 603(b). The parties believe that the treatment provided for in this Subsection is consistent with the obligations of the United States under the General Agreement on Tariffs and Trade. However, this Subsection is not intended to conflict with United States international obligations and does not require that the United States take any action which would be inconsistent with such obligations. Should such a conflict arise, the United States will seek appropriate waivers or modifications of its international obligations.

Subsection 603(d). The term "a developing territory" as used in this Subsection is intended to refer to the June 25, 1971 General Agreement on Tariffs and Trade waiver regarding preferential tariff treatment of goods from developing countries and territories and to other similar benefits which may be available to the Northern Mariana Islands.

Section 702. It was not considered necessary to include this Section among the provisions listed in Section 105 which may be modified only by mutual consent. The reason for this omission is that, while Section 702 constitutes a commitment on the part of the United States Government, it is of a transitional nature extending for seven years following the establishment of the new Government. In addition, a failure to appropriate funds as required by that Section would constitute a dispute under Article IX which could be submitted to the courts pursuant to the provisions of that Article.

Subsection 704(c). The reference in this Subsection and in Subsection 803(b) to a United States Department of Commerce composite price index is intended to refer to the United States Gross National Product Implicit Price Deflator.

Section 803. It is understood that the Government of the Northern Mariana Islands may exercise its obligations and rights under this Article through a legal entity established to receive and hold public lands in trust for the people of the Northern Mariana Islands.

Section 805. The parties intend that it will be the responsibility of the Government of the Northern Mariana Islands to implement the provisions of this Section. In particular, the parties understand that the Constitution or laws of the Northern Mariana Islands will define the operative terms in this Section, including such terms as "long-term interest in real property", "acquisition" and "persons of Northern Mariana Islands descent".

Subsection 806(a). The use of any property or interest acquired by the United States pursuant to this Subsection will not be limited to the public purposes for which it was originally obtained.

Section 901. This Section is not intended to preclude the Government of the Northern Mariana Islands from requesting the Congress of the United States to confer non-voting delegate status on the Resident Representative provided for in this Section.

Subsection 904(c). The parties note that this Subsection is not intended to preclude the Government of the Northern Mariana Islands from discussing matters of mutual concern with other Pacific island communities.

Section 1001. In accordance with the request of the Marianas District Legislature, the United States intends to administer the Mariana Islands District separately from the remainder of the Trust Territory following approval of the Covenant by the people of the Northern Mariana Islands. In establishing other qualifications for voting in the plebiscite the United States will con-

sult with representatives of the Marianas District Legislature and other local leaders.

Section 1002. The parties note that the United States has stated that it is now planning on a provisional basis to terminate the Trusteeship for all the districts by 1981.

APPENDIX E

ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

[SEAL]

DECEMBER 6, 1976

[91]

ARTICLE IV: JUDICIAL BRANCH

Section 1: Judicial Power. This section authorizes the legislature to create those trial and appellate courts as it finds necessary, subject only to the limitations imposed by this article. Those tribunals might include municipal courts, juvenile courts, and specialized courts to hear particular categories of matters such as those involving immigration, naturalization, citizenship or questions [92] of Northern Marianas descent. The authority of the legislature to vest in these courts the judicial power of the Commonwealth is limited only by this article and by other provisions in the Constitution, such as section 8 of article III, which grant jurisdiction to the Commonwealth courts over specific questions.

Section 2: Commonwealth Trial Court. This section requires the legislature to establish a Commonwealth trial court. The trial court's jurisdiction will extend to all actions involving land regardless of the amount at issue. An action involving land is one in which any right, title

or interest in land is disputed. Such an action includes all other claims or requests for relief properly joined under the rules of the court even though not involving land. The court may provide for separate trial of the land and non-land issues presented by a single cause of action and may order that non-land issues that otherwise would not be within the jurisdiction of the Commonwealth trial could be removed to the United States District Court for the Northern Mariana Islands.

The trial court's jurisdiction also includes civil actions not involving land except those in which the amount in controversy exceeds $5,000 in value. The determination of whether the matter in controversy exceeds $5,000 in value is made from the face of the pleadings. Even if the judgment ultimately is for more than $5,000, the court is not divested of jurisdiction.

In addition, the trial court's jurisdiction includes all criminal cases except those in which the defendant, if convicted, could be fined more than $5,000 or imprisoned for a period exceeding five years. In cases in which one offense is involved, the maximum fine or [93] sentence is determined from the statute defining the offense. In cases where more than one offense is involved, the maximum fine or sentence is determined by the statute defining the offense that carries the largest fine or the longest term. The possibility of consecutive sentences is not included in this determination.

At any time after the Constitution has been in effect for five years, the legislature may expand the jurisdiction of the trial court to include all civil actions or only those falling within a jurisdictional amount limitation that is larger than $5,000. Similarly, the jurisdiction over criminal actions may be redefined to include more or all

criminal actions arising under Commonwealth law. This initial limitation of jurisdiction assumes that a United States District Court for the Northern Mariana Islands will be established and funded under article IV of the Covenant to exercise jurisdiction over causes that the Commonwealth trial court is not empowered to decide. If a federal district court is not available in the Northern Mariana Islands, the legislature may at any time expand the Commonwealth trial court's jurisdiction to include all local cases. The expansion of the jurisdiction of the trial court to include all Commonwealth civil and criminal actions would restrict the jurisdiction of the United States District Court to that defined by article IV, section 402(a), and appeals from the Commonwealth trial court.

If the United States District Court of the Northern Mariana Islands is established pursuant to article IV of the Covenant, it will have jurisdiction over all civil and criminal cases that arise in the Commonwealth that the Commonwealth courts do not have the power to decide. Thus, for at least five years following the effective date of the [94] Constitution, the federal district court will have jurisdiction to try all civil cases where the matter in controversy exceed $5,000 (except matters involving land) and all criminal cases where the defendant may be fined an amount exceeding $5,000 or imprisoned for a term exceeding five years. After the expiration of the five-year period, the federal court's jurisdiction will depend on whether the legislature expands the jurisdiction of the Commonwealth trial court under section 2 of this article.

This section permits the legislature to staff the court with some part-time judges. There must be at least two full-time judges, one of whom is assigned to Rota and

another of whom is assigned to Tinian. The rules promulgated pursuant to section 8 of this article could require the temporary transfer of the judges sitting in Rota or Tinian or on the land division to other judicial duties as warranted by their workloads. This would permit the legislature to provide for only two full-time judges at the outset and to handle the caseload in Saipan with those full-time judges, to the extent they were not occupied in Rota or Tinian, and with supplementary part-time judges. The requirement that a full-time judge sit in Rota and Tinian does not mean that the judge has to spend full time in Rota and Tinian. This provision permits the court to establish regular sessions, such as one week per month or one week every two months, in which a full-time judge will sit in Rota and Tinian. These judges could then spend the remainder of their available time hearing cases in Saipan.

This section requires the creation of a specialized division of the trial court to handle land matters for at least five years after [95] the establishment of the court. The special division has its own calendar so that land matters do not compete with other civil matters for priority in being heard. Any judge of the Commonwealth trial court may sit in the land division, although it is intended that the judge who sits in this division should have some special qualifications to enable land cases to be resolved expertly and expeditiously. The legislature may abolish the land division five years after the establishment of the court.

This section permits the creation of other divisions of the Commonwealth trial court, such as those for small claims, divorce and child support matters, misdemeanors or traffic violations. These divisions need not be courts of record.

Section 3: Commonwealth Appeals Court. This section confers on the legislature the power to establish an appellate court at any time five years after the effective date of the Constitution. In the event that no federal district cout is available under article IV, section 402(c), of the Covenant to hear appeals of Commonwealth cases, the legislature may establish a Commonwealth appeals court at any time.

It is intended that the district court have jurisdiction over all appeals in Commonwealth cases for at least five years, regardless whether those cases were tried by the Commonwealth trial court or by the federal district court. After the conclusion of the five-year period, the legislature may create a Commonwealth appeals court and the federal district court would have appellate jurisdiction over only those Commonwealth matters, if any, that the Commonwealth appeals court is not empowered to hear.

[96] When sitting as an appellate court, the district court will consist of three judges, at least one of whom must regularly serve as either a part-time or full-time judge of a division of the Commonwealth trial court that functions as a court of record. It is intended that only judges who are currently assigned to divisions of the trial court that are courts of record be permitted to sit as members of an appellate panel.

It is not intended to limit the Commonwealth trial court from assigning judges to the various divisions, both those of record and those not of record, on a rotating basis. It is intended that a judge who conducts the trial of a case, whether in the Commonwealth trial court or federal district court, be disqualified from participating in the decision of any appeal of the case. It is intended

that whenever a judge from the Commonwealth trial court is needed to sit as a member of an appellate panel of the district court, the district court will notify the Commonwealth trial court and the Commonwealth trial court will appoint a judge for that purpose. This function may be delegated to the chief judge of the Commonwealth trial court.

Section 4: Appointment and Qualifications. This section prescribes the method of selection, term of office, and qualifications required of Commonwealth judges. Commonwealth judges are appointed by the governor subject to the advice and consent of the senate. Under this provision, the initial term of every judge will be six years. Judges may be reappointed by the governor to one or more terms.

The legislature may increase the length of terms of judges who have served at least one term to not more than twelve years. If [97] a judge is reappointed by the governor, it would be for a twelve-year rather than a six-year term. It is intended that a judge be qualified for a twelve-year term if at any time he has served a six-year term. For example, if a judge serves a six-year term, subsequently returns to private practice for ten years, and then is once again appointed to the bench, he would be eligible for a twelve-year term. If the judge does not serve a full six-year term, he would not be eligible for a twelve-year term regardless of when he was reappointed. For example, if a judge is appointed to serve a six-year term and serves only four years before he is appointed to another position, he would be ineligible to be appointed to a twelve-year term immediately thereafter. He would have to be appointed to another six-year term and complete that term before being eligible for a twelve-year term. A judge who has completed a full six-year term on

one court, such as the Commonwealth trial court, would be eligible for a twelve-year term on another court, such as the Commonwealth appeals court.

To be eligible for appointment to the Commonwealth bench, an individual must be at least thirty years of age and a citizen or national of the United States at the date of taking office. The legislature may impose other standards that prospective judges must meet. Although the language of this section does not explicitly require that Commonwealth judges be attorneys, it is intended that all judges have legal training. This section affords the legislature the flexibility to define precisely what legal training will be required.

Section 5: Compensation. Under this section, the legislature must fix the compensation received by judges. Compensation may be [98] limited to salary or it may also include a reasonable allowance for expenses. Once set, a judge's salary may not be reduced during the judge's term of office.

Article II, section 10, provides that the legislature may establish a commission to study, and make recommendations concerning, the compensation of Commonwealth judicial officers. Article II, section 10, provides that legislative salaries may be changed only upon the recommendation of the commission. Article III, section 5, provides that the salaries of the governor and lieutenant governor may be changed only upon the commission's recommendation. Because article IX, section 5, does not refer to the commission, the legislature may act on judicial salaries without having established a commission. Similarly, it may act if the commission has made no recommendation on judicial salaries and it may act contrary to any recommendation of the commission.

The only restriction imposed by this section is that the legislature may not decrease the salary of a judge during his term of office. This does not mean that the legislature may never decrease the salaries of judges. If a decrease in salary is enacted, it applies only to judges who are appointed for the first time subsequent to the date of enactment or who are reappointed after the expiration of a term on a date subsequent to the date of enactment. If a salary decrease is enacted, all judges currently serving terms at the date of enactment will continue to receive their previous salary until the end of their terms.

If the legislature provides an allowance for expenses, it may [99] change the allowance at any time and apply the change to a judge during his term of office.

Section 6: Sanctions. This section prescribes the sanctions that may be applied to judges. Judges will be subject to impeachment for treason, commission of a felony, corruption or neglect of duty. The procedures for impeaching a judge will be identical to those applicable against other civil officers under article II, section 8.

This section also directs the legislature to establish an advisory commission on the judiciary. Composed of lawyers and representatives of the public, the advisory commission will have the power to recommend that the governor remove, suspend or otherwise sanction a judge who has engaged in illegal or improper conduct. This section requires only that the commission include more than one lawyer and more than one representative of the public. It is intended that the representatives of the public be non-lawyers, and that they be representative of the geographic areas and ethnic minorities within the

Commonwealth. The section does not prevent one or more judges from serving on the commission.

Until the legislature establishes a commission, the governor may not remove, suspend or sanction any judge for any reason. After the advisory commission is established, the governor may remove, suspend or sanction a judge only if that action is consistent with a recommendation of the commission. If the commission makes no recommendation, the governor cannot remove, suspend or sanction a judge. The grounds on which the advisory commission may recommend that a judge be removed, sanctioned or suspended are limited to illegal or improper conduct. These grounds comprehend those specified as a basis for impeachment but [100] include other offenses as well. For example, illegal conduct is not limited to the commission of a crime, but includes the violation of any civil statute or regulation. Improper conduct is not limited to neglect of duty; it might also include violations of the canons of judicial ethics. It is intended that the independence of the judiciary be fully protected and that the commission act only to the extent necessary to ensure the integrity and proper functioning of the Commonwealth courts.

Section 7: Limitations on Activities of Judges. This section limits the permissible activities of judges. Under this provision, no full-time judge may occupy any other compensated government office. This means that a full-time judge may accept any government position so long as the position carries no salary and he is not paid for his service, and so long as his service does not violate the requirement of separation of powers imposed by article II, section 203, of the Covenant. If a government position has previously been filled by a person who was paid a salary for his work in that position, that position

is compensated and a judge is disqualified from occupying it, even if the judge is not paid for his work in that capacity.

A full-time judge may not practice law. The practice of law means any activity that constitutes the giving of legal advice or the representation of another person or entity with respect to any legal matter. This prescription is not intended to include activities arising from non-compensated government positions that a judge is qualified to hold under this section.

These limitations do not apply to part-time judges. A definition of "full-time" and "part-time" may be supplied by the [101] legislature. If the legislature does not provide a definition, a part-time judge is any judge who is not obligated to devote all regular working days to the business of the court.

Some limitations are binding on all judges. Judges are prohibited from making any direct or indirect financial contribution to any political organization or candidate. Judges are also barred from holding any executive office in a political organization. No judge may participate in a political campaign of any kind. It is not intended to limit in any way the exercise of a judge's rights to express his views regarding political candidates or to vote for the candidates of his choice. A judge may seek an elective public office only if he resigns at least six months before his nomination or before he becomes a candidate through means other than nomination.

Section 8: Rule-making Power. This section authorizes the Commonwealth courts to propose rules governing civil and criminal procedure, judicial ethics, admission to the bar of the Northern Mariana Islands, the discipline of attorneys after their admission, the affairs of the bar of

the Commonwealth, and other matters concerning the administration of the court system. In performing this function, the judiciary may either act as a body or delegate the task to a judge or a committee of judges.

A rule proposed by the judiciary must be submitted promptly to the legislature. The rule will take effect sixty days after its submission unless either house of the legislature rejects it. Until rules of criminal and civil procedure are adopted in this manner, the rules of the Trust Territory High Court will regulate the proceedings [102] of the Commonwealth courts. If a rule is proposed and rejected, the comparable rule, if any, of the High Court will continue in effect.

This section does not limit the legislature's authority to enact laws on these subjects. It is intended to permit the expertise of the judges to be used in the most efficient manner to develop rules on numerous and highly technical matters.

* * *

[163] ARTICLE XII: RESTRICTIONS ON ALIENATION OF LAND

Section 1: Alienation of Land. This section incorporates into the Constitution the basic requirements with respect to land [164] alienation set out in article VIII, section 805(a), of the Covenant. It requires that the acquisition of permanent and long-term interests in real property in the Commonwealth be restricted to persons of Northern Marianas descent. By including this provision in the Constitution, the drafters intend that the restrictions included in this article will continue in effect during the twenty-five years after termination of the

Trusteeship Agreement required by the Covenant and thereafter unless changed by a constitutional amendment. This reflects the importance of this subject to the people of the Commonwealth and the judgment that only the people directly should be able to alter this provision.

The Convention followed three basic principles in implementing the restrictions on land alienation mandated by the Covenant. First, the Convention used only those restrictions necessary to the accomplishment of the purpose that underlies the Covenant. Second, the Convention avoided the use of any racial or ethnic classification to accomplish its purpose. Its classifications are based on neutral principles of place of birth, domicile, incorporation and other essential attributes. Third, the Convention spent a great deal of time and effort to find the least restrictive means of accomplishing its purpose.

The Convention's purpose in implementing the restrictions on land alienation is to protect the culture and traditions of the people of the Northern Mariana Islands, to promote the political growth needed in the first critical years of the Commonwealth, to accomplish the political union with the United States with a minimum of cultural and economic dislocation, and to provide the stability needed to survive in [165] the family of nations.

The Convention believes that restrictions on the alienation of land are necessary to this purpose because the social and economic benefits to be derived from land ownership are unique and cannot be duplicated in any other way.

The Commonwealth created by this Constitution is small. It has only a few hundred square miles of land and about 15,000 people. Although the population may grow in the future, the available land cannot increase.

Land is one of the principal sources of social stability. It gives root to the pride, confidence and identity as a people that will permit the cooperative action necessary to a successful Commonwealth. If the land passes out of the hands of the people of the Northern Mariana Islands, these unique social and economic benefits will be lost.

Land is the only significant asset that the people of the Commonwealth have. There are no substantial mineral resources; there is no large manufacturing enterprise capable of sustaining large numbers of people; there is no valuable location on important trade routes. Virtually all of the land on the islands now belongs to the people of the Northern Mariana Islands, either individually or collectively. Land is the basis of family organization in the islands. It traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members. Inevitably, substantial economic and cultural dislocation would follow should this land be lost by transactions with outsiders in the near future.

Land is not held primarily for its economic value, and [166] economic values have not in the past competed with the social and family values represented by the land. From the end of World War II to the effective date of the Constitution, the law enforced in the Northern Mariana Islands has forbidden alienation of land to persons not citizens of the Trust Territory of the Pacific Islands. The people of the Northern Mariana Islands have had little opportunity to gain experience in land transactions of the kind that would be necessary to compete effectively against investors from other countries with well-developed economics.

Restrictions on land alienation are necessary to preserve the character and strength of the communities

that make up the Commonwealth. The people of the Commonwealth are willing to sacrifice the short-term economic gain that might be achieved by putting their land on the market in order to achieve the longer-term economic and social gain that will come from preserving their family and social order, thus protecting the basis for enduring economic growth. The people are willing to take the time to learn how best to use their land, and to develop complete land use plans and comprehensive zoning regulations. These tools will be necessary to regulate the use of land in the Commonwealth and restrictions on land alienation will provide the necessary time to develop and enact these protections.

The Commonwealth is new. The people have had little experience in self-government. It is a more prudent course to proceed carefully, accepting change only as it proves of long-term benefit to the Commonwealth as a whole. It is necessary to construct certain safeguards at the outset of the Commonwealth government to ensure that the change in [167] the political order is supported by stability in the social order.

The requirements with respect to land alienation in this article are the least restrictive way to achieve the Convention's purpose. First, section 1 restricts only the acquisition of permanent and long-term interests in real property in the Commonwealth to persons of Northern Marianas descent. It does not prevent outsiders from using land in the Commonwealth. It permits the acquisition by persons from the United States, persons from other parts of the Trust Territory, and alient of short-term and non-permanent interests in land. It permits a wide range of uses of land by such persons for commercial and personal purposes.

Second, the Convention sought to design restrictions that would include in the group eligible to own land all those persons who are part of the community that has made the creation of the Commonwealth possible, and to exclude as nearly as possible only those persons who are not a part of that community. In so doing, the Convention recognized that no classification system based on neutral principles can be completely effective or error-free, including only those who should be included or excluding only those who should be excluded. The Convention has erred on the side of including a few of those persons who should be excluded rather than excluding any of those persons who should be included.

Section 2: Acquisition. The Covenant uses the phrase "acquisition of such (permanent and long-term) interests" in real property in the Commonwealth, but does not include any definition of the term "acquisition." The Convention included a definition of this term [168] in the Constitution because of its central importance to the implementation of the restrictions. The definition of "acquisition" includes all transfers by sale, lease, gift, inheritance or any other means.

This section makes two exceptions to this definition. The first exception is for transfers to spouses by inheritance. This type of transfer is not considered an acquisition because property acquired or maintained by a married couple is usually supported by the labors of both spouses. When one spouse dies, the other spouse should be able to take over as owner of the family property. This exception means that spouses who are *not* persons of Northern Marianas descent will be able to own permanent or long-term interests in land if they are acquired by inheritance. This exception applies to the spouses of persons who now own real property in the Common-

wealth but who are *not* of Northern Marianas descent. This exception does not apply to children because within the one or two generations likely to be affected by the restrictions in this article nearly all children of Northern Marianas descent landowners will qualify as persons of Northern Marianas descent who are eligible to inherit land.

The second exception applies to banks or others that acquire permanent and long-term interests in real property through mortgage foreclosure. Those who give mortgages normally do not do so for the purpose of acquiring property. They are interested in receiving repayment of the principal amount loaned plus the interest on the principal. Those who give mortgages insist on a right to acquire interests in real property only to protect their investment in case of [169] a default. Their intention, therefore, is not to retain the property acquired through foreclosure, but to sell it in order to recover their investment. For this reason, foreclosure of a mortgage is not treated as an acquisition if, within five years of the foreclosure, the bank or other mortgagee disposes of the interest gained through the foreclosure. This exception permits normal banking operations to continue, and the five-year limitation prevents circumvention of the restrictions on alienation through the use of sham mortgages that would be foreclosed with consent.

Section 3: Permanent and Long-Term Interests in Real Property. This section defines the term "permanent and long-term interests in real property" used both in the Covenant and in section 1. Two types of interests are included: freehold interests and leasehold interests of longer than forty years including renewal rights.

The term freehold interests includes freehold estates of inheritance which are fee simple absolute, fee simple determinable, fee simple subject to a condition subsequent, fee simple subject to an executory limitation, fee simple conditional and fee tail. It also includes freehold estates not of inheritance which are estates for one's own life, estates for the life of another, and estates for one's own life and the life of another. It includes all types of ownership ot title granted by all types of deeds, wills, or by intestate succession. It also includes all types of sharing arrangements for ownership – ownership jointly vested in two or more persons, ownership vested in two or more persons as tenants in common, and ownership in two or more persons vested in succession.

[170] Leasehold interests are those granted by contract for the possession and use of real property usually for a specified number of years. Under a lease agreement, the owner retains title but gives up his right to possession and exclusive use during the term of the lease. This section applies only to leases of more than forty years. The Convention believes that this definition of "long-term" is appropriate in light of past experience with leases in the Trust Territory, under circumstances similar to those in the Northern Mariana Islands, and because of past experience in the Northern Mariana Islands. The Convention also believes that forty years is the least restrictive definition of "long-term" that will serve the practical needs of the Commonwealth.

The forty-year limitation imposed by this section applies to any extension in a lease term as well as to the original term. Renewal rights are an integral part of a lease and should not be permitted to constitute an extension of the time limitation.

Under this section, aliens and other persons who are not of Northern Marianas descent will be permitted to use property under leases of forty years or less. They will be able to build substantial structures and improvements because they will have forty years to amortize these investments. A wide variety of commercial and private uses will be feasible under this limitation.

Section 4: Persons of Northern Marianas Descent. This section defines the term "persons of Northern Marianas descent" which is used in both the Covenant and in section 1 of this article.

The Northern Marianas Islands have been ruled by the Spanish, [171] the Germans, the Japanese and the Americans. Over the years there has been some migration to and from these islands by people from each of these ruling nations and from the other islands in the Pacific. People occasionally have come to the Northern Mariana Islands from other places. Most of these people came as administrators or entrepreneurs. They maintained their citizenships elsewhere and clung to their national identities. They did not adopt the culture or integrate with the people of the Northern Mariana Islands. Throughout the history of the Northern Mariana Islands, those who considered themselves as the people of the Northern Marianas Islands have been the Chamorros and the Carolinians who settled on the various islands, formed a cohesive social group, worked for the political and economic betterment of the Northern Mariana Islands, and considered these islands as their home.

For this reason, this section defines the term "person of Northern Marianas descent" as a person who meets two criteria: (1) a citizen or national of the United States; and (2) a person of at least one-quarter Northern

Marianas Chamorro or Northern Marianas Carolinian blood.

A baseline was provided in order to define what is meant by a person of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood. The Convention did not use a racial or ethnic classification for this purpose. All persons who were born in the Northern Mariana Islands by 1950 and who were citizens of the Trust Territory are defined as full-blooded Northern Marianas Chamorros or Northern Marianas Carolinians. The term "by 1950" means up to and [172] including December 31, 1950.

From this baseline, it will be possible to calculate the percentage of Northern Marianas descent necessary to qualify under the first part of the section. For example, if a husband and wife both were domiciled in the Northern Mariana Islands by 1950 and both were citizens of the Trust Territory, both are considered as 100% Northern Marianas descent and their children will be 100% Northern Marianas descent. If a husband was domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory and his wife was born in the Philippines and was a Philippine citizen, then the husband is 100% Northern Marianas descent and the wife is 0% Northern Marianas descent. Their children are 50% Northern Marianas descent and they qualify to own property under this section since only 25% Northern Marianas descent is required. If a person who is 50% Northern Marianas descent marries a person who is 0% Northern Marianas descent, their children will be 25% Northern Marianas descent and will still qualify to own property.

The words "or a combination thereof" inserted after the requirement of one-quarter Northern Marianas Cham-

orro or one-quarter Northern Marianas Carolinian blood mean that if a Chamorro marries a Carolinian the percentage of Northern Marianas descent of any children of that marriage is not decreased.

The Convention included the requirement of citizenship in the Trust Territory because it believes that persons who were domiciled in the Northern Mariana Islands by 1950 but who did not ever become Trust Territory citizens are not within the group that should [173] be eligible to own land. By maintaining citizenship somewhere outside the Trust Territory, these persons indicated that their basic allegiance was elsewhere. Similarly, the Convention believes that the children of Americans or Filipinos who were stationed here temporarily prior to 1951 and who may have been born in the Northern Mariana Islands for that reason should not be included in the group eligible to own land in the Northern Mariana Islands. These children would have the citizenship of their parents. They would not have been Trust Territory citizens and therefore would not qualify.

Trust Territory citizenship was conferred pursuant to Article II of the Trusteeship Agreement which states:

> "1. The administering authority shall take the necessary steps to provide the status of citizenship of the Trust Territory for the inhabitants of the Trust Territory."

Following the approval of the Trusteeship Agreement on July 18, 1947, the United States Department of State began considering the citizenship issue. At the same time, plans were made for an Organic Act to be enacted by Congress for the Trust Territory. The Department of State decided to await the passage of an Organic Act by the United States before conferring citizenship status on

the Trust Territory inhabitants in order to avoid an "interim citizenship" and the problems that might create. After several years of deliberation, however, plans for an Organic Act were abandoned.

The citizenship requirement of the Trusteeship Agreement was not implemented formally until 1966 when title 53, section 1, of the Trust Territory Code was enacted that provides as follows:

> [174] 1. *Nationality.* (1) All persons born in the Trust Territory shall be deemed to be citizens of the Trust Territory, except persons, born in the Trust Territory, who at birth or otherwise have acquired another nationality.
>
> (2) A child born outside the Trust Territory of parents who are citizens of the Trust Territory shall be considered a citizen of the Trust Territory while under the age of twenty-one years, and thereafter if he becomes a permanent resident of the Trust Territory while under the age of twenty-one years.

During the interim from 1947 to 1966 the term "citizen of the Trust Territory" was used by the Department of the Navy and Department of State to describe persons including: "(T)hose born in the Trust Territory except those born of non-indigenous persons or who have acquired another nationality at birth or later and those born outside the Trust Territory of a parent who is an indigene and who has resided therein prior to such birth."

The term "citizen of the Trust Territory of the Pacific Islands" as used in this article is intended to mean those persons who were citizens of the Trust Territory under the Trust Territory Code and those persons who were treated as citizens of the Trust Territory by the administering agencies of the United States government acting under the Trusteeship Agreement.

The requirement with respect to Trust Territory citizenship [175] is met if a person acquired Trust Territory citizenship at any time and for any period of time between 1947 and the terminationof the Trusteeship Agreement with respect to the Commonwealth. This requirement therefore is met by persons who acquired Trust Territory citizenship during this period and subsequently became United States citizens. Under Secretarial Order No. 2989 promulgated by the United States Secretary of the Interior on March 24, 1976 and any subsequent order relating to the separate administration of the Northern Mariana Islands, it is intended that the Government of the Northern Mariana Islands alone have the authority to confer the rights of Trust Territory citizenship upon persons born or domiciled in the Northern Mariana Islands by 1950.

The Convention included the requirement of United States citizenship or national status because it believes that only those who intend to place their allegiance with the Commonwealth and with the United States should be included in the group eligible to own land. Citizens of other countries and citizens of the remainder of Micronesia after the Trusteeship is ended (assuming no permanent affiliation with the United States) would be excluded under this requirement because their basic allegiance is elsewhere. This requirement would exclude contract workers who came to the Northern Marianas from foreign countries or from other districts within the Trust Territory. Many of these people came to the Northern Mariana Islands because for many years the government for the entire Trust Territory was located in Saipan. If the seat of government had been elsewhere, these people would not have resided in the Northern Mariana Islands at all. The [176] Convention believes that

these persons should not be included in the group eligible to own land.

The Convention also made provision for the adopted children of persons of Northern Marianas descent. They will automatically become persons of Northern Marianas descent if they are adopted while under the age of eighteen. This age limitation permits legitimate adoptions and prevents adoptions for the purpose of circumventing the restrictions on land alienation. This section does not specify the percentage of Northern Marianas descent that an adopted child would acquire from his adopting parents. It is intended that the adopted child shall have the same position with respect to Northern Marianas descent as would a natural child. That is, if a person who is 50% Northern Marianas descent is married to a person of 0% Northern Marianas descent, their natural children, if they had any, would be 25% Northern Marianas descent. However, it is recognized that there are many possible variations. For example, a child adopted by a person who is unmarried, or by a person who marries more than once, would require a special rule. These matters are left to a court for decision under the specific facts of each special case.

Section 5: Corporations. This section permits a corporation to be considered as a "person of Northern Marianas descent" if it meets *four* qualifications.

First, a corporation must be incorporated in the Commonwealth. This requirement will make ineligible corporations that are incorporated anywhere else in the United States, in the Trust Territory or in any [177] foreign country. The purpose of this restriction is to give control over the corporations that own land in the Commonwealth to the government of the Common-

wealth, which will be able to enact statutes regulating incorporation.

Second, a corporation must have its principal place of business in the Commonwealth. Under this requirement, a corporation may have offices in Guam, Japan or any other place, but the principal office must be in the Commonwealth. The purpose of this restriction is to limit land ownership to corporations that are operating primarily in the Commonwealth. Whether the Commonwealth is the "principal" place of business will depend on all the relevant factors including the volume of business done elsewhere, the number of corporate offices, the number of corporate personnel assigned to the Commonwealth location, and the volume of the corporation's business. It is intended that this determination be made in accordance with the pertinent legal precedents in other areas within the jurisdiction of the United States.

Third, a corporation must have directors that govern its affairs, and at least 51% of the directors must be persons of Northern Marianas descent. The purpose of this restriction is to ensure that any corporation that owns land in the Commonwealth is governed by persons of Northern Marianas descent. In this way, the decisions of the corporation will be made by persons who would qualify to own land themselves and who have a stake in the future of the Commonwealth.

Fourth, the corporation must have voting shares and at least 51% of the voting shares must be owned by persons of Northern Marianas [178] descent. The purpose of this requirement is to maintain control of the corporation in the hands of persons who are of Northern Marianas descent. Under this section, the owners of 51% of the voting shares must be natural persons who qualify as persons of

Northern Marianas descent. Ownership of stock by corporations (both those qualified as persons of Northern Marianas descent under this section and those not qualified) is permitted by this section, but only ownership by natural persons is counted in determining whether the 51% requirement is met. This provision does not require that non-voting shares be owned, in any percentage, by persons of Northern Marianas descent. This provision does not apply to debt instruments of a corporation.

The organization and shareholding of corporations changes from time to time as new directors are elected and as shares of stock are sold. This provision covers all such changes by providing that a corporation is eligible to own land only so long as it meets all the requirements. If the percentage of shareholders falls below 51% Northern Marianas descent, the corporation is automatically ineligible to own land and the enforcement rule in section 6 takes effect.

Section 6: Enforcement. This section provides that any transaction made in violation of section 1 is void from the beginning and has no force or effect. This means that if a person sells land to a person who is not of Northern Marianas descent, that transaction never takes effect and never has any consequence with respect to the title of the land. The title remains in the person who tried to sell it. This section affects only the title in land. It does not affect the cause of action that the buyer may have if the seller takes his [179] money and then does not part with title because the buyer is not a person of Northern Marianas descent. Those causes of action would be governed by the general law of contracts. This section does not affect any right in land acquired by any person prior to the effective date of the Constitution. A person who owned or leased land

prior to the effective date of the Constitution retains his right in that land. If he chooses to sell or otherwise transfer a long-term interest in the land, then the provisions of this article apply.

This section also provides that if a corporation becomes ineligible under section 5, any land that it owns that is acquired after the effective date of the Constitution will be forfeited to the government. This is a simple provision easily understood by those who are responsible for the affairs of corporations. It does not provide that land owned by noncomplying corporations reverts to the original owner because that could result in unjust enrichment of the original owner and also might open the door to fraudulent transactions. If the legislature finds that forfeiture to the government is too harsh or that it should not apply to small family corporations, it could provide that the lands be transferred back to the corporation if the requirements of section 5 are once again met. This matter is left to the discretion of the legislature. This section does not affect any right in land acquired by any corporation before the effective date of the Constitution. If a corporation that owns land before this effective date fails to qualify as a person of Northern Marianas descent, or qualifies and thereafter becomes disqualified because of a change in organization, management or ownership, the corporation may retain any land that it [180] owned before the effective date. If the corporation sells this land or transfers a long-term interest in it, that transaction is covered by this article and is void if not in conformity with this article.

APPENDIX F

SECTION BY SECTION ANALYSIS OF THE COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

February 15, 1975

MARIANAS POLITICAL STATUS COMMISSION

* * *

[32] ARTICLE IV – JUDICIAL AUTHORITY

Article IV deals with the judicial authority of the United States in the Northern Marianas, and the relationship between the United States federal court and the local courts in the Northern Marianas.

Section 401. Section 401 requires the United States to establish for and within the Northern Mariana Islands a court of record to be known as the "District Court for the Northern Mariana Islands." This will assure the people of the Northern Marianas access to their own federal court. The establishment of a separate District Court for the Northern Mariana Islands does not preclude the appointment of the District Judge, United States Attorney and United States Marshall for Guam to hold the corresponding federal offices in the Northern Marianas at the same time, if the workload is such that they can accomplish their responsibilities in the Northern Marianas expeditiously and completely. Congress may be asked to enact legislation which will permit the Northern Marianas Legislature to instruct the United States Attorney and United States Marshal for the Northern

Marianas to perform certain functions related to [33] the execution of local law. This will permit efficient utilization of all available services and save local government funds. The United States will determine the pay and tenure of the federal judge in the District Court for the Northern Mariana Islands. It is expected that he will be appointed in the way that judges for federal courts generally are appointed – that is, by the President of the United States with the advice and consent of the Senate of the United States. Of course, the views of the people of the Northern Marianas with respect to the person who is appointed to be the federal judge here will be made known to the United States Government through the Northern Marianas Resident Representative in Washington. Local judges, on the other hand, will be elected or appointed by the local government in accordance with the local constitution and local law.

This Section provides as a matter of administrative convenience that the Northern Marianas will constitute a part of the same judicial circuit of the United States as does Guam. At the present time, this is the Ninth Judicial Circuit. This affects only federal jurisdiction and does not at all affect the powers of the local courts. Nor does it imply that Guam and the Northern Marianas will have a single court system. California and Hawaii, for example, are also within the same judicial circuit of the United States as is Guam.

[34] **Section 402.** This Section deals with the jurisdiction of the federal court which will be established in the Northern Marianas.

Subsection (a) provides that the District Court for the Northern Marianas will have the same jurisdiction as a district court of the United States in a state of the union.

In addition, under this subsection, the Northern Marianas federal court will have jurisdiction with respect to cases raising questions of federal law regardless of the sum which is in dispute. Under present federal law it is sometimes necessary to have a case which involves more than $10,000 in order to present a claim in federal court. This subsection assures that persons with claims arising under the Constitution or laws of the United States in the Northern Marianas will be able to have access to the federal court regardless of the amount of money which is involved in their case.

Subsection (b) provides that the District Court for the Northern Marianas will have jurisdiction over local cases unless the Constitution or laws of the Northern Marianas vest such jurisdiction in a court established by the local government. This subsection permits the local government to take advantage of the existence of a federal court by having the federal judge hear these local cases. It is left completely up to the local legislature whether or not to permit [35] the federal court to hear these cases, and the local legislature, in accordance with the local Constitution, will be able to transfer jurisdiction from the federal court to the local courts whenever appropriate. Similar provisions have been successful in Guam and in the Virgin Islands. As the Northern Marianas grow in population and as resources are available to fund local courts, it can be anticipated that jurisdiction over local matters will be transferred from the federal court to the local courts. Subsection (b) also assures that when the federal court hears a local case, it will be considered as if it were a court of the Northern Marianas for the purposes of determining the requirements of indictment by grand jury and trial by jury in both civil and criminal cases. Section 501 of the Covenant assures that the local

legislature will determine whether there is any necessity for an indictment by grant jury or any right to trial by jury in civil and criminal cases of a local nature. Where such local cases are actually heard in the federal court under this Subsection (b), this sentence assures that the procedure to be followed will be determined by the local legislature.

Subsection (c) provides that the Federal District Court in the Northern Marianas will have such appellate jurisdiction as the Constitution or laws of the Northern Marianas may provide. This Section permits the local [36] legislature or the local Constitution to vest in the District Court jurisdiction to review decisions made in, for example, the trial courts of the Northern Marianas. Somewhat similar language was contained in the Guam Organic Act, and there appearently has been some question about its effect in that Act. Though the circumstances are quite different, particularly in view of the fact that the Covenant provides a mechanism for eventual Supreme Court review of local decisions, see Section 403(a), it should be noted that the negotiating parties clearly understood that this Subsection (c) places no obligation on the Legislature of the Northern Marianas to grant any appellate jurisdiction to the District Court for the Northern Marianas. The Legislature may choose at any time and from time to time to establish appellate courts of the Northern Marianas and to eliminate the appellate jurisdiction of the District Court. Subsection (c) also provides that when the District Court sits as an appellate court it will consist of three judges, at least one of whom must be a judge of a court of record in the Northern Mariana Islands. This assures local participation in appellate decisions even when they are rendered by the local federal court.

Section 403. This Section deals with a variety of technical matters relating to United States judicial authority within the Northern Mariana Islands.

[37] Subsection (a) assures that the relations between federal courts and the courts of the Northern Mariana Islands will be essentially the same as the relationship between the federal courts and the courts of the states. This section covers such matters as appeals, petitions for review of cases by the Supreme Court of the United States, removal of cases from the local courts into the federal courts, the issuance of writs of habeas corpus to prevent unlawful imprisonment, and other matters and proceedings such as injunctions. The Section also provides that for the first 15 years after the establishment of an appellate court of the Northern Mariana Islands, the United States Court of Appeals for the judicial circuit which includes the Northern Marianas (presently the Ninth Judicial Circuit of the United States) will be able to review final decisions of the Marianas Courts where those decisions involve the Constitution, treaties or laws of the United States, unless those decisions are reviewable in the Federal District Court for the Northern Marianas. This provision permits appeals with respect to federal matters to be taken to the Court of Appeals, which is located in San Francisco. In the absence of this provision such appeals would have to go directly to the Supreme Court of the United States in Washington, which may be inconvenient for the litigants. Under this provision, appeals could still be taken from the Court of Appeals to the Supreme Court.

[38] The special provision for appeals to the Court of Appeals is not applicable if appeals can be taken to the Federal District Court in the Northern Marianas, for under established federal law appeals will go from that

court to the Court of Appeals in any event. After the expiration of 15 years, appeals from the Courts of the Northern Marianas will be taken only to the United States Supreme Court, unless the local Constitution of the local legislature directs that such appeals be heard in the Federal District Court for the Northern Marianas, from which they may also eventually go to the Supreme Court.

Subsection (b) provides that those portions of Title 28 of the United States Code (the Judicial Code of the United States) which apply to Guam or to the District Court of Guam will be applicable to the Northern Marianas or the District Court for the Northern Marianas except as otherwise provided in Article IV. This Section is largely technical and simply assures that the rules of procedure and other relevant federal laws are applicable. It also assures, however, that several important statutes which are now applicable with respect to Guam will be applicable with respect to the Northern Marianas. In particular, the statute which permits courts of the United States to hear cases which involve citizens of Guam, 28 U.S.C. §1332, and the statute which requires that full faith and credit be given to the acts, records and judicial proceedings of Guam, 28 U.S.C. §1738, will also be applicable with respect to the Northern [39] Marianas.

* * *

[116] **Section 805.** This Section assures that the people of the Northern Marianas will be able to retain the ownership of their most precious asset, their land. This Section expressly recognizes the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands and the

desirability of protecting them against exploitation and promoting their economic advancement and self-sufficiency. For these reasons the people of the Northern Marianas will be able to prevent the alienation of their land to outsiders, notwithstanding any other Article of the Covenant or any provision of the Constitution [117] or treaties or laws of the United States applicable to the Northern Mariana Islands. Under this Section the Government of the Northern Mariana Islands *must* until 25 years after the termination of the Trusteeship regulate the alienation of permanent and long-term interests in property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent. After the expiration of this 25-year period, the Government of the Northern Mariana Islands may regulate the alienation of property as described. Moreover, the Government of the Northern Marianas is specifically authorized to regulate the extent to which any one person may hold or own land which is now public land.

It is intended that it will be the responsibility of the local government to implement the provisions of this Section. In particular, the local government will define the operative terms of the Section, including such terms as "long-term interest in real property", "acquisition" and "persons of Northern Mariana Islands descent."

Section 805 is a fundamental provision of the Covenant and cannot be altered except with the mutual consent of the Government of the Northern Mariana Islands and the Government of the United States. Thus, it will be entirely up to the Government of the Northern Marianas and the people of the Northern Marianas to determine the precautions which they will take to prevent their land from being alienated.

MOTION FILED
OCT 21 1992

No. 92-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,
Petitioners,

v.

CONCEPCION S. WABOL and ELIAS S. WABOL,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF InterPacific Resorts (Saipan) Corporation IN SUPPORT OF THE PETITIONERS

WILLIAM T. COLEMAN, JR.*
DONALD T. BLISS
DEBRA A. VALENTINE
RICHARD W. PARKER
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5325

Attorneys for Amicus Curiae

**Counsel of Record*

October 21, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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---

MOTION OF INTERPACIFIC RESORTS (SAIPAN) CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

InterPacific Resorts (Saipan) Corporation (hereafter "PIC") respectfully moves for leave to file the attached brief *amicus curiae* in this case in support of petitioners, as provided in Rule 37 of the Rules of this Court. Attorneys for the petitioners have consented to this filing. The consent of the attorneys for the respondent was requested but refused.

PIC is a Saipan corporation and thus a United States citizen. However, PIC is barred from owning or acquiring

a "long-term" leasehold interest in real property in the Northern Mariana Islands ("NMI") because the directors and beneficial shareholders of PIC do not meet the ethnicity requirement of NMI Constitution Article XII, the constitutional validity of which is the central issue in the present appeal. Further, PIC is currently a defendant in a lawsuit which challenges the validity under Article XII of the lessor's title to a Saipan hotel property currently under lease to PIC.[1] PIC thus has a direct interest in the outcome of this appeal.

The accompanying *amicus* brief establishes that the decision of the court below is in conflict with longstanding precedents of this Court in four important respects not emphasized in the petitioners' brief. First, the brief accompanying this motion establishes that the right to equal protection of the laws (including and especially the right to be free of government-mandated racial discrimination in holding real property) is a "fundamental right" within the legal doctrine set forth in the Insular Cases. Careful examination of those cases and their progeny reveals that the constitutional provisions recognized in those cases as "non-fundamental," and therefore not necessarily applicable to the unincorporated territories, are exclusively procedural rights or institutional arrangements that lie uniquely within our American or English legal heritage, such as the right to jury trial. By contrast, this Court has uniformly recognized that basic substantive rights, such as the right to be free of government-mandated racial discrimination, apply with full force in the territories, possessions and commonwealths of the United States. The lower court ignored that key distinction and departed from this Court's precedents by exempting government-man-

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[1] *Cruz v. Terra Firma, Inc., et al.*, No. 92-825 (Super. Ct. Commw. N.M.I. filed July 15, 1992). This is one of the many cases cited in the accompanying brief in which the validity of ownership or leasehold interests has been challenged in the NMI, causing chaos in the land title system there.

dated racial discrimination in the territories from any equal protection scrutiny.

Second, the accompanying *amicus* brief shows that the court below erred in concluding that the constitutional rights at issue here are not fundamental "in the international sense." To the contrary, the accompanying brief demonstrates, as petitioners' brief does not, that the right to be free of government-mandated racial discrimination is universally recognized in the Constitutions of many nations and in international conventions.

Third, the accompanying *amicus* brief shows that the lower court improperly invoked and then misapplied the "impractical and anomalous" test set forth in Justice Harlan's concurring opinion in *Covert v. Reid*, 354 U.S. 1 (1957). In so doing, the lower court reached a result not contemplated by Justice Harlan's opinion and contrary to the other precedents of this Court.

Finally, the brief tendered with this motion expressly demonstrates, as the petitioners' brief does not, that the suspect classification challenged here would have failed the equal protection scrutiny required by the Fifth or Fourteenth Amendments and the precedents of this Court, had such scrutiny been conducted. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990). If accepted by the Court, the arguments set forth in the accompanying *amicus* brief would be grounds for granting certiorari to review the lower court's decision in this case.

For the foregoing reasons, PIC respectfully requests that this motion be granted.

Respectfully submitted,

/s/ William T. Coleman, Jr.

WILLIAM T. COLEMAN, JR.*
O'MELVENY & MYERS
555 13th St., N.W.
Washington, D.C. 20004
(202) 383-5325
Counsel for InterPacific Resorts (Saipan) Corporation
*Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-255

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,

Petitioners,

v.

CONCEPCION S. WABOL and ELIAS S. WABOL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF AMICUS CURIAE OF InterPacific Resorts (Saipan) Corporation IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

InterPacific Resorts (Saipan) Corporation ("PIC") submits this brief as *amicus curiae* in support of petitioners. It is of vital importance to the future of constitutional rule in the territories that this Court preserve the principles that at least the "fundamental rights" embodied in the Constitution apply in a Commonwealth of the United States, and that the right to be free of invidious, government-mandated

racial discrimination is such a fundamental right. The Ninth Circuit's decision below repudiates these principles and should be reversed.

PIC is a Saipan corporation and thus a United States citizen. However, PIC is not a "person of Northern Mariana Islands descent" because it does not meet the ethnicity test of the Constitution of the Commonwealth of the Northern Mariana Islands ("NMI") ("Constitution") Article XII, Section 5, which requires that a majority of the board of directors be persons of NMI descent and that a majority of shares of the corporation be owned by persons of NMI descent. Because PIC fails this ethnicity test, PIC is barred under Article XII from owning or holding a "long-term" leasehold interest in real property in the Northern Mariana Islands.

PIC currently operates a hotel, which it leases, on the Island of Saipan in the Commonwealth of the Northern Mariana Islands. PIC is one of a number of targets of lawsuits brought by persons of NMI descent who are seeking to avoid otherwise valid property sales or renegotiate otherwise valid leases by using Article XII of the NMI Constitution to cast a cloud upon the title of the NMI seller or lessor of the subject property. These lawsuits typically allege that the lessor, or some prior owner or imputed owner in the chain of title, failed to qualify as a "person of Northern Mariana Islands descent" (despite appearances); or that such NMI person used funds furnished by a non-NMI person to acquire the property and thereby created an equitable fee interest ("resulting trust") in favor of a non-NMI person, thereby voiding *ab initio* the sale and transfer of title. In the lawsuit to which PIC is party, it is alleged that PIC's lessor does not hold valid title to the central parcel of land underlying PIC's hotel because a transferring party several steps up the chain of title was allegedly not an NMI person.[1]

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[1] *Cruz v. Terra Firma, Inc.* No. 92-825 (Super. Ct. Commw. N.M.I. filed July 15, 1992). *See also Ferreira v. Mafnas Borja*, No. 90-047 (S. Ct. Commw. N.M.I., Feb. 18, 1992) (order enforcing Article XII), *appeal*

Thus, NMI Constitution Article XII, as applied, has deprived PIC (and other U.S. citizens) of the right to own property in the Northern Marianas and has cast a cloud over the validity of its leasehold interest in a major Saipan hotel.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari filed by Philippine Goods, Inc., TransAmerica Corporation, and Victorino Villacrusis, should be granted because this case involves questions of exceptional importance. The Ninth Circuit's decision badly misinterprets and misapplies the precedents of this Court.

If allowed to stand, that decision will establish, in effect, that NMI and the Government of the United States may collaborate in mandating race or ethnic discrimination in property ownership in a commonwealth or territory of the United States without so much as an examination of whether

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docketed No. 92-15523 (9th Cir. March 18, 1992); *Aldan-Pierce v. Mafnas*, No. 89-003 (S. Ct. Commw. N.M.I. June 20, 1991) (order enforcing Art. XII), *appeal docketed*, No. 91-16240 (9th Cir. July 30, 1991) (voiding title under Article XII on a resulting trust theory despite the court's concern "that a decision (to do so) may unleash chaos in the Northern Mariana's land title system and economy."). These lawsuits indeed have caused havoc in the Northern Mariana's land title system and economy. Besides the present appeal and the two cases cited above which are also on appeal, at least nine civil actions raising Article XII challenges are currently pending in the Superior Court of the Commonwealth of the Northern Mariana Islands. *Olipai v. Hillblom*, No. 92-984 (filed Aug. 12, 1992); *Chong v. Tadohiro Kamoshito*, No. 91-264 (filed Mar. 28, 1991); *Mafnas v. Fennell*, No. 90-550 (filed June 10, 1990); *Cepeda v. Hefner*, No. 88-682 (filed Sept. 22, 1988); *Mafnas v. Loretta*, No. 88-696 (filed Sept. 28, 1988); *Iglesias v. Layne*, No. 88-704 (filed Sept. 22, 1988); *Reyes v. Millard*, No. 88-705 (filed Oct. 6, 1988); *Castro v. Layne*, No. 88-707 (filed Oct. 7, 1988); *Tudela v. Layne*, No. 88-715 (filed Oct. 14, 1988).

this denies U.S. citizens the equal protection of the laws.[2] Indeed, the lower court decision will help to establish an even more dangerous precedent: that political authorities may disregard basic constitutional rights of individuals in the territories whenever the political authorities deem it convenient or expedient to do so.

The court below acknowledges—and properly so—that "fundamental" constitutional rights apply in the territories of the United States. *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990). It therefore is undisputed that fundamental substantive rights guaranteed by the United States Constitution apply to U.S. citizens residing in the Commonwealth of the NMI. Nonetheless, the court below inappropriately expands a doctrine developed around the turn of the century in the so-called "Insular Cases" that certain non-fundamental (usually procedural) arrangements deriving from Anglo-Saxon traditions—*e.g.*, the right to a trial by jury or in-

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[2] *Covenant to Establish a Commonwealth in Political Union with the United States of America*, § 805, *reprinted as amended in* 48 U.S.C.A. § 1681 note (West 1987) (hereafter, "Covenant") states in relevant part: "the Government of the Northern Mariana Islands . . . (a) *will* . . . restrict the acquisition of . . . [permanent and long-term interests in real] property to persons of Northern Mariana Islands descent" (emphasis supplied). Article XII of the NMI Constitution reiterates this prohibition and defines persons of "Northern Mariana Islands descent," in racial terms. Persons born before 1950 may obtain status as an NMI person on the basis of citizenship and place of birth or domicile. All persons born after 1950, however, are assigned their landholding status based exclusively on their ancestry. Neither the drafters of the Covenant nor the court below contest that this is a government-mandated racial or ethnic classification. *Joint Resolution to Approve the "Covenant to Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America," And For Other Purposes: Hearings on H.J. Res. 549 Before the Subcomm. on General Legislation of the Senate Comm. on Armed Services*, 94th Cong., 1st Sess. 147-148 (1975); *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1990). Yet the Ninth Circuit found that equal protection analysis did not apply. *See Wabol*, 958 F.2d at 1462 n.22 ("The district court's conclusion that equal protection analysis was applicable was error.").

dictment by a grand jury—are not necessarily required in the U.S. territories.

This narrow exception set forth in the Insular Cases has no application to the basic, substantive rights at issue here. This Court has found that the right to be free from government-mandated racial discrimination in the ownership of property is a fundamental value incorporated in the Constitution's Equal Protection Guarantee. It is a value that has attained universal recognition transcending national borders. Under this Court's jurisprudence, it thus cannot be compromised in its application to U.S. citizens in the states or territories. In finding that this fundamental right does not apply to the Commonwealth of the NMI, the court below improperly invoked and then misapplied the "impractical and anomalous" standard. The result is a decision that would allow the Government simply to waive our most precious liberties, without constitutional scrutiny, in the name of passing political interests such as the ability to "acquire necessary military outposts." 958 F.2d at 1462. Under constitutional principles properly applied, such interests must be considered, if at all, only as a *part* of the required equal protection scrutiny, not in place of it.

Certiorari should be granted here because the Ninth Circuit's conclusion that equal protection guarantees do not apply in a Commonwealth of the United States is in conflict with the Insular Cases and *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976). Further, the Ninth Circuit departed from this Court's precedents by approving government-mandated racial discrimination in landholding, without evidence that such discrimination could survive *any* of the standards of heightened scrutiny mandated by this Court's decisions in situations involving suspect classifications. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

ARGUMENT

I. COVENANT § 805 AND ARTICLE XII OF THE NMI CONSTITUTION INFRINGE UPON FUNDAMENTAL RIGHTS APPLICABLE TO NMI.

A. The Right To Be Free Of Government-Mandated Discrimination Based On Race Or Ethnic Origin Is A Fundamental Right Protected By The Equal Protection Guarantee Of The Fifth Or Fourteenth Amendments.

Few, if any, constitutional rights have been deemed more central to our system of democratic values in this century than the right to be free of government-imposed invidious classifications based on race, ethnic origin or alienage, whether such discrimination is manifested in education, *Brown v. Board of Education*, 347 U.S. 483 (1954), *Bolling v. Sharpe*, 347 U.S. 497 (1954); in jury qualification, *Strauder v. West Virginia*, 100 U.S. 303 (1879); in marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); in the right to engage in lawful business, *Examining Board of Engineers, Architects & Surveyers v. Flores de Otero*, 426 U.S. 572 (1976), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), or in the acquisition, ownership, or disposal of property, *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). This right has been embodied in the Fifth and Fourteenth Amendments' universal guarantees of each individual's right to due process and the equal protection of the laws.[3]

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[3] While the Fourteenth Amendment explicitly guarantees all persons the equal protection of the laws against state encroachment, the Fifth Amendment due process clause has been held to contain an equal protection component which protects individuals against federal infringement. *See Examining Board*, 426 U.S. at 601 n.33. Here, Congress has imposed a race-based restriction which NMI has implemented, *see supra* at 18-19. Therefore, Article XII should be treated as a congressionally-mandated restriction.

While this Court has held, in the so-called "Insular Cases" and since, that only the "fundamental rights" embodied in the Constitution apply *ex proprio vigore* in the "unincorporated" territories of the United States, the basic right of each person to the equal protection of the laws invariably has been considered among the "fundamental rights" that the Constitution unconditionally guarantees. Thus, in the concurring opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901), which set forth the doctrine of territorial incorporation later adopted by a unanimous Court in *Balzac v. Porto Rico*, 258 U.S. 298 (1922), Justice White agreed that Congress had the power to impose special duties on imports from Puerto Rico notwithstanding the constitutional provision that "all duties, imposts, and excises" be uniform. But he also acknowledged:

> there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion[;] . . . the right to personal liberty and individual property; . . . to due process of law and to an equal protection of the laws; . . . Of the latter class are the rights to . . . particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence . . .

182 U.S. at 282-283.

In *Balzac*, the same distinction between "fundamental" rights and peculiarly Anglo-Saxon procedures or institutions recurs. There, a unanimous Court held that a people "living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution [the jury trial] of Anglo-Saxon origin, and when." 258 U.S. at 310. But the Court also confirmed that "[t]he guar-

anties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico. . ." 258 U.S at 312-313.

Indeed, this Court has never deviated from the principle that fundamental rights—including the guarantee of equal protection and the right to own property—must be observed in our territories, commonwealths and possessions. In *Examining Board*, the Court held that a "statutory restriction [imposed by Puerto Rico] on the ability of aliens to engage in the otherwise lawful private practice of civil engineering" in Puerto Rico is an unconstitutional violation of the Equal Protection clause of the Fourteenth Amendment or the equal protection component of the Due Process guarantee of the Fifth Amendment. 426 U.S. at 599-601. Likewise, the Court held in *Calero-Toledo v. Pearson Yacht Leasing Co.*, that the right to own property in Puerto Rico or be deprived of it only with just compensation is a fundamental right of persons there. 416 U.S. 663 (1974).

In holding, without even applying equal protection analysis, that government-mandated racial discrimination in landholding may be permitted in NMI, the court below has misread and misapplied the Insular Cases and their progeny. The court's stated reasons for its holding do not withstand scrutiny.

First, the lower court reasoned that the right in question here was not the general right to equal protection of the laws but rather the narrower right of equal access to property in NMI. That line of argument is directly contradicted by the *Examining Board* decision, where this Court held that the Fourteenth Amendment's Equal Protection clause (or the equal protection component of the Fifth Amendment Due Process clause) applies in Puerto Rico. 426 U.S. at 599-601. Significantly, the *Examining Board* Court did not differentiate according to the activity protected from racial

discrimination—that is, it did not ask whether the particular activity at issue reflected a "fundamental right." Had the Court done so it surely would have found that the ability to practice civil engineering was not a "right" at all, much less a fundamental one protected by the U.S Constitution. Here, the lower court erred by focusing on the fundamentality of the activity (landholding) protected from discrimination, rather than the fundamentality of the basic right to freedom from discrimination.[4]

Even if one assumes, contrary to *Examining Board* and to sound equal protection analysis, that the relevant issue is whether the right of equal accēss to property is fundamental, the lower court's decision remains groundless. For the case law is clear that the right of equal access to property ownership is itself a fundamental right within our constitutional system. In *Balzac*, for example, this Court held that the constitutional guarantee that no person may be deprived of property without due process of law was "fundamental" and had "full application" in the Commonwealth dof Puerto Rico. 258 U.S. at 312-13. Likewise, in *Lynch*, this Court held that "[e]quality in the enjoyment of property rights was regarded by the framers of [the Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." 405 U.S. at 544 (*quoting Shelley*, 334 U.S. at 10). *See also Buchanan v. Warley*, 245 U.S. 60, 74-79 (1917).[5] Clearly the right to the equal enjoyment

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[4] The lower court cited *Califano v. Torres*, 435 U.S. 1, 3 (1978), in support of its conclusion that the scope of the equal protection guarantee is limited when applied to Puerto Rico. *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 n.19 (1990). But *Califano* stands for no such proposition. That case merely held that Congress may deny Supplemental Security Income to persons residing in Puerto Rico. No invidious classification relevant to equal protection analysis was at issue there.

[5] Indeed, 42 U.S.C. § 1982 (1988) provides, in language derived from Section 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was under consideration: "All citizens

of property rights is not an exception to the general right of the individual not to be denied equal protection of the laws based upon his or her race; *both* are fundamental rights fully applicable in NMI.

The lower court's attempted distinction between rights that are "fundamental [only] to the American scheme of justice," and rights that form "the basis of all free government," is at best irrelevant here. That distinction has been applied only to differentiate institutional arrangements or procedural rights of distinctly Anglo-Saxon origin, such as the right to indictment by grand jury, trial by petit jury, and unanimous verdict. *See, e.g., Ocampo v. United States*, 234 U.S. 91 (1914) (no "fundamental right" to indictments by grand jury in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (no "fundamental right" to unanimous verdict in criminal cases in Hawaii); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial). As seen, the substantive rights at issue here have always been treated as fundamental rights that form "the basis of all free government."

Even if one accepts the lower court's (erroneous) holding that the only "fundamental" rights that apply to the U.S. territories are those that are, in addition, "fundamental in the international sense," the Ninth Circuit decision still lacks foundation. For the right of citizens to be free of state-mandated racial discrimination in property holding, as in other matters, is fundamental not only in an Anglo-American regime, but in the "international sense" as well. The Ninth Circuit fails to explain why the right is not fundamental to free government since it is recognized as a basic right throughout the world. The right is enshrined in the Constitutions of the nations from Germany and Japan to

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of the United States shall have the same right, in every State *and Territory*, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property" (emphasis supplied).

Guinea-Bissau and Jamaica,[6] and uniformly supported in international covenants and conventions.[7]

In sum, by their own terms, the Insular Cases offer no

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[6] *See* The Basic Law of the Federal Republic of Germany, Art. 3 ("No one may be prejudiced or favoured [sic] because of his sex, his parentage, his race, his language . . ."); The Constitution of Japan, Ch. III Art. 14 ("All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, . . ."); Constitution of the Republic of Guinea-Bissau, Title II, Art. 23 ("All citizens are equal before the Law, have the same rights and are subjected to the same duties, without distinction of race, sex, social, intelectual [sic] and cultural level . . ."); Jamaica (Constitution) Order in Counsel 1962, Ch. III, Art. 13 ("Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour [sic], creed or sex . . . to each and all of the following, namely—(a) life, liberty, security of the person, the enjoyment of property and the protection of the law . . .").

[7] *See International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 4, Art. 1. § 2 ("All peoples may, for their own ends, freely dispose of their natural wealth and resources . . .") and Art. 2. § 2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour [sic], sex. language, . . .") (signed but not ratified by the United States); *International Convention on the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 212, Art. 5 ("States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour [sic], or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (d) . . . (v) [t]he right to own property alone as well as in association with others; . . .") (signed but not ratified by the United States); *Universal Declaration of Human Rights*, Art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law.") (United States not a signatory). Moreover, the charter under which the United States assumed Trusteeship responsibility for the NMI stipulated that "the administering authority shall . . . protect the rights and fundamental freedoms of all elements of the population without discrimination . . . ." *United Nations Trusteeship for Former Japanese Mandated Islands*, 61 Stat. 3301, T.I.A.S. No. 1665, Art. 6 § 3. Amicus does not argue here that the foregoing covenants and conventions directly mandate the avoidance of Covenant § 805 and NMI Constitution Article XII. They merely establish that the right to equal protection of the laws is "fundamental" in the international sense.

justification for the constitutional infringement presented here, even in the context of a distinctly foreign culture. They certainly offer no excuse for laws abridging the most basic rights of U.S. citizens who have chosen, and received, Commonwealth status and political union with the United States.

If denial of the right to be free of government-mandated racial restrictions on property ownership is a fundamental guarantee of the U.S. Constitution, then Congress' effort to carve out an exception for NMI must be unavailing. Congress' exercise of its enumerated powers is always subject to constitutional restraint. *See United States v. Robel*, 389 U.S. 258, 264 (1967) (" '[e]ven the war power does not remove constitutional limitations safeguarding essential liberties.' "); *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("no agreement with a foreign nation can confer power on the Congress, or an any other branch of Government, which is free from the restraints of the Constitution"); *Boos v. Barry*, 485 U.S. 312, 324 (1988) (same).

B. The Court Below Misapplied This Court's Precedents By Ratifying Government-Mandated Racial Or Ethnic Discrimination In NMI, Without Equal Protection Analysis, On Grounds That Allowing Equal Access To Land In NMI Would Be "Impractical And Anomalous."

As seen, the Insular Cases and their progeny (including and especially *Examining Board*) flatly contradict the lower court's holding that the right to equal protection of the laws is not a fundamental right applicable in the territories. Thus, the court below erred in failing to engage in any equal protection or due process analysis to reach its conclusion. Moreover, the Ninth Circuit's reliance on the "impractical and anomalous" standard in support of its holding was misguided; it offers no shelter for the court's decision.

The "impractical and anomalous" standard was derived from *Reid*, 354 U.S. at 1, albeit not from the Court's opinion

in that case. *Reid* confronted the issue whether a serviceman's wife, on a military base overseas, was constitutionally entitled to indictment by grand jury and a petit jury trial for the alleged murder of her husband. A four-member plurality of the Court held she was entitled to both. In reaching this result, the Court criticized the Insular Cases and suggested that full constitutional rights should apply to all U.S. citizens wherever located.[8] Thus, the opinion of the Court in *Reid* opposes the notion that equal protection guarantees for U.S. citizens may be dispensed with if they are "impractical and anomalous."

The court below extracted the "impractical and anomalous" standard—the centerpiece of its holding—from Justice Harlan's concurring opinion in *Reid*. But that concurrence merely underscores the error of the lower court's analysis here. In *Reid*, Justice Harlan merely observed that "there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous." 354 U.S. at 75. Thus, Harlan's "impractical and anomalous" standard plainly addresses only a procedural right and is offered as an explanation, not an expansion, of the doctrine of the Insular Cases.

Justice Harlan relied on *Balzac*, one of the later Insular Cases, as an authority for his "impractical and anomalous standard." In *Balzac*, this Court had observed that the result

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[8] 354 U.S. at 8-9 ("While it has been suggested [in the Insular Cases] that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou Shalt Nots" which were explicitly fastened on the Federal Government by the Constitution and its Amendments.") *Id.* at 14 ("[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.").

of applying a rigid jury requirement "no matter what the needs or capacities of the people . . . may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice." 258 U.S. at 309-10. The Court concluded that "a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries . . . should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin [jury trial], and when." *Id.* at 310. Therefore, jury trials might be waived in order to further the fundamental goals of a trial: fundamental fairness and the orderly administration of justice. But *Balzac* also underscored that the basic rights of life, liberty, property and due process "had from the beginning full application in the Philippines and Porto Rico." *Id.* at 313.

Justice Harlan, adopting the *Balzac* approach in *Reid*, argued that the application of a certain procedural rights (again, a jury trial) to Americans overseas, may depend, in part, on "the particular local setting, the practical necessities, and the possible alternatives." 354 U.S. at 75. This analysis reduced essentially to a consideration of what process was "due" under particular circumstances. *Id.* Indeed, the concurrences of both Justices Harlan and Frankfurter assumed what *Balzac* declared: that the "due process" right itself could not be set aside. *Id.* at 53, 75. Thus, the lower court's holding in this case—that a government-mandated denial of equal rights to own property may be ratified without any due process (or equal protection) scrutiny—finds no sanction in the concurrences in *Reid*, or in the Insular Cases.

Moreover, even assuming that the "impractical and anomalous" standard is applicable here, the lower court badly misapplied it. The lower court failed to examine, in any detail, "the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." 354 U.S. at 75. The court below declined to probe the necessity of the challenged landholding restriction and examined no race-neutral alternatives (such as zoning or pre-

sale review of major real property transfers according to stated criteria).[9]

After offering, with minimal discussion, a host of (largely extraneous) interests ostensibly served by the landholding restriction, the Ninth Circuit acknowledged that an attack upon the "precision with which the restrictions operate to further these interests . . . would have substantial force." *Wabol*, 958 F.2d at 1461. But the court then cavalierly preempted the attack with an observation that "[a] restriction need not be precisely tailored to qualify for exemption from equal protection scrutiny." *Id.* at 1462. By misapplying the "impractical and anomalous" standard, the Ninth Circuit has created a fictive "exemption" from equal protection scrutiny that clearly contravenes the express holding of *Examining Board* and the Insular Cases.

II. COVENANT § 805 AND ARTICLE XII OF THE NMI CONSTITUTION CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY APPLICABLE TO SUSPECT CLASSIFICATIONS UNDER THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Inasmuch as the Constitution requires equal protection scrutiny of the race- or ethnic-based property restriction at issue here, the question arises whether the restriction can

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[9] The contrast with *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), which also applied the "impractical and anomalous" standard, is instructive. Faced with an appeal of the denial of an American citizen's "right" of jury trial in American Samoa, the District of Columbia Court of Appeals remanded the case to the district court for a full factual finding as to whether Samoan customs and traditions would render trial by jury there "impractical and anomalous." The criteria for applying that test were strictly related to the achievement of a fair and orderly trial. On remand, the district court found that Samoan society and its court system had developed to the point that jury trial was practical there. *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977).

withstand such scrutiny. The record below offers no basis for an affirmative finding.

To begin, the restriction at issue here cannot fairly be characterized as "benign." It favors established property holders who are members of the racial majority of NMI citizens and who control the power structure there. It discriminates against a number of minority groups, including naturalized and resident alien workers from the Philippines and other East Asian countries and U.S. citizens from the mainland. The record reveals that the number of resident alien workers in NMI has grown tenfold in the last ten years. U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing, Commonwealth of the Northern Marianas Islands (March 1992) at 16, 18. These various, largely Asian groups represent discrete and insular minorities "for whom . . . heightened judicial solicitude is appropriate." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976), *quoting Graham v. Richardson*, 403 U.S. 365, 372 (1971). Not just investors, but small shopkeepers, farmers, renters, homeowners and tradesmen of non-NMI descent are the victims of the racially restrictive property holding measure. If not benign, the measure here at issue is plainly invalid on its face. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., concurring).

Even assuming the measure were to be considered "benign" discrimination mandated by Congress, the restriction is constitutionally permissible only to the extent that, at a minimum, it serves important governmental objectives within the power of Congress and is substantially related to the achievement of those objectives. *Metro Broadcasting v. F.C.C.*, 110 S. Ct. 2997 (1990).[10] While the protection of

[10] This is the most lenient standard of scrutiny articulated by this Court for examining a suspect classification. *Compare Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (requiring remedial purpose and measures "narrowly tailored" to achievement of that purpose). Yet Covenant § 805 and Article XII, as applied, fail to meet even the *Metro* test.

NMI persons from exploitation may well be an important government objective, Covenant § 805 and NMI Constitution Article XII are not reasonably necessary to, and do not substantially advance, that end.

First, the record is bereft of factual evidence that non-NMI persons are more likely to undertake exploitative or culturally- or family-damaging purchases of land than would persons of NMI descent, or that NMI persons are somehow culturally disabled from protecting their own interests in the absence of outside interference in their affairs. The measure aptly illustrates this Court's insight elsewhere that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *see also* Branch, "The Constitution of the Northern Mariana Islands: Does A Different Cultural Setting Justify Different Constitutional Standards?," 9 Am. J. Int'l L. & Pol. 35, 61 (1980) (predicting that within twenty-five years a majority of the land of any value would be held by a small minority of wealthy persons of "Northern Marianas descent").

Second, the restriction is badly under and over-inclusive, with respect to its ostensible purposes of "protecting local culture and values and preventing exploitation of inexperienced islanders . . ." *Wabol v. Villacrusis*, 958 F.2d 1450, 1461. It is under-inclusive because it allows persons of NMI descent to own property even if they live outside the NMI or apply the property to culturally alien uses, such as casinos. It is over-inclusive because it excludes from property ownership those persons who are living within NMI and within its cultural traditions, if such persons lack the requisite genealogy.

Third, the record reveals no effort by U.S. or NMI officials to explore reasonable, race-neutral alternatives to race-based restrictions.[11] Here, a requirement for administrative

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[11] Compare *Metro Broadcasting*, 110 S. Ct. at 2997, 3019 (racial clas-

review of all proposed sales or long-term leases of land above a certain size to test for fairness, full disclosure and cultural or environmental impact might well have served the stated goal more effectively than race-based prohibitions. Also, a zoning plan might have been used to guide the pace and character of development on the Islands. The record does not indicate that these race-neutral alternatives, or any other, were explored.

Fourth, the measure contains no provision for evaluating the necessity and effectiveness of the restriction imposed until at least twenty-five years from the date of enactment of the Covenant. If the race-based measure at issue here was not precisely tailored to begin with, it is certain that the imprecision will grow as 25 years pass without modification or review. *Metro Broadcasting*, 110 S. Ct. at 3024.

Fifth, the landholding restriction imposes impermissible burdens on *minority* residents within the NMI. Non-NMI persons are significantly disabled from (1) realizing the appreciation of equity investments in NMI, since all such investments are prohibited; (2) making long-term improvements in leased property with an assurance of adequate return; and (3) engaging in any occupation which may require the ownership or long-term lease of NMI land.

Sixth, there is little or no evidence on the record that invalidation of NMI's alienation restriction would impair the United States' ability to "form political alliances and acquire necessary military outposts" or "interfere with the performance of our obligations." 958 F.2d at 1462. According to a leading chronicler of the negotiations leading to the formation of the Commonwealth, the Marianas Political Status Commission ("MPSC"—representing the people of NMI), in a May 27, 1974 position paper, *questioned* the wisdom of making the land alienation restrictions mandatory. The

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sification adopted only after long study and painstaking consideration of all available alternatives).

MPSC preferred to leave the issue to the NMI people. *See* Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* at 592 (1989). United States negotiators insisted that the restrictions be mandatory, for at least for 25 years, otherwise U.S. assistance might be reduced. *Id.* NMI negotiators yielded to U.S. pressure, resulting in Covenant § 805. The record thus affords no reason to assume that consensual modification of Covenant § 805 and Article XII could not be obtained so as to conform the United States' international position to its constitutional obligation.

Finally, and most of all, the nature and experience of the NMI landholding restriction, as applied, offers little comfort that the restriction can or will accomplish its stated purpose of promoting the preservation of indigenous cultural and family traditions. For example, assuming Congress is legitimately concerned with assisting "traditional" landholding patterns in NMI (regardless of what individuals there want), it is by no means clear that allowing leases of forty (now fifty-five) years will accomplish that purpose more effectively than permitting the outright sale of the same property. The main impact of the NMI landholding restriction, in practice, may well be a simple "deadweight loss" in value and income to both NMI and non-NMI persons, as artificial market barriers and legal uncertainties drive risks up and land prices down.

Under these circumstances, it cannot be said as a matter of law that the landholding restrictions at issue here are necessary to or substantially advance an important government purpose.[12]

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[12] Simplistic analogies to land alienation restrictions upheld in cases arising under the "Indian legislation" are no substitute for the careful equal protection analysis required by the Constitution. The "Indian legislation," and cases arising thereunder, are inapposite because they did not impose alienation restrictions based on race or ethnic group. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 (1974).

CONCLUSION

For the foregoing reasons, and those expressed in the brief of the petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.*
DONALD T. BLISS
DEBRA A. VALENTINE
RICHARD W. PARKER
O'MELVENY & MYERS
Counsel for InterPacific Resorts Corporation

**Counsel of Record*

October 21, 1992

Under this legislation, treaties with, *e.g.*, the Creek, Quapaw and Pueblo Nations barred the sale of Native American land *to any person* without the approval of the Federal Government, at least for a period of time. *See, e.g., United States v. Noble*, 237 U.S. 74, 75 (1915) (Quapaw allotted land inalienable for twenty-five years after the date of the patents). The restrictions at issue in these cases were race-neutral as to the buyer. They applied to Native American sellers not on the basis of their race, but rather on the basis of the United States Government's residual or reversionary interest in land allotted to Native Americans, as well as a unique guardian-ward relationship that has long existed between the United States Government and those Native Americans who choose to live on federal reservations. Here, no such residual interest or guardian-ward relationship supports the Government's imposition of alienation restrictions on real property interests in the NMI. Nor does the Hawaiian Lands legislation offer a precedent since it has never been challenged.

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No. 92-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,
Petitioners,

vs.

CONCEPCION S. WABOL and ELIAS S. WABOL,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

MARYBETH HERALD
Counsel of Record
for Petitioners
2121 San Diego Avenue
San Diego, California 92110
Telephone: (619) 297-9700

JOE HILL
P.O. Box 917
Saipan, MP 96950

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S PRECEDENTS AND ENDORSES A DANGEROUS DOCTRINE CURTAILING FUNDAMENTAL RIGHTS OF UNITED STATES CITIZENS IN THE TERRITORIES

Respondents' brief fails to reconcile the Ninth Circuit's decision in this case with the Insular Cases and their progeny. Brief of Respondents in Opposition ("Resp. Br.") at 17-24. The *Insular Cases* stand

squarely for the proposition that fundamental rights apply with full force in United States territories and possessions. *Downes v. Bidwell*, 182 U.S. 244, 283-84 (1901); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922). In *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), this Court confirmed that the guarantee of equal protection is a fundamental right that extends even to aliens in Puerto Rico. Indeed, the rights that have been deemed "non-fundamental" and therefore optional in the territories under this Court's jurisprudence have been exclusively procedural rights or institutional arrangements of uniquely Anglo-Saxon origin. By contrast, the right to be free of invidious racial discrimination is a substantive right that is fundamental to free government and is universally acknowledged in free nations. *See* Brief of Amicus Curiae InterPacific Resorts (Saipan) Corporation ("InterPacific Amicus Br."), at 10-11 nn.6, 7, and cases and authorities cited therein.

Further, equal protection guarantees have been held applicable in the territories regardless of any constitutional entitlement to engage in a particular activity. *Flores de Otero*, 426 U.S. at 572. This Court has recognized consistently that the right to be free of invidious discrimination extends across the full spectrum of human activities—*e.g.*, sitting at a particular public lunch counter, working as an architect, or owning land—regardless of any constitutional entitlement (or lack thereof) to engage in the activity itself. *See* Petition for Writ of Certiorari ("Pet.") at 14-16, and cases cited therein.

Respondents cite authorities upholding restrictions on aliens' rights, Resp. Br. at 19-23. These precedents

are inapposite here since, as respondents acknowledge, the petitioner is a citizen of the United States. Resp. Br. at 20 n.15.[1]

Respondents offer no support for their and the Ninth Circuit's unprecedented conclusion that application of equal protection doctrine to the territories "must be on a case-by-case basis in order to 'accommodate the unique social and cultural conditions and values of the particular territory' under consideration." Resp. Br. at 23, quoting *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1990) reprinted in Petition for Writ of Certiorari, Appendix ("Pet. App.") at 23. The only authority respondents advance for this dubious requirement, the *Flores de Otero* case, stands, in fact, for the opposite proposition. There, this Court recognized that the Equal Protection clause applies categorically in the Commonwealth of Puerto Rico. Analysis of Puerto Rico's special situation was properly conducted as part of equal protection scrutiny, not in place of it. And the analysis offered there was searching and factual, in contrast to the cursory and deferential rationalization offered by the Ninth

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[1] Thus, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court declined to extend Fourth Amendment protections to a search of an alien residence in a foreign land. But this decision offers no support for respondents' theory that constitutional protections may be withheld from U.S. citizens living in a Commonwealth of the United States. *See* Resp. Br. at 19. Likewise, in *Terrace v. Thompson*, 263 U.S. 197 (1923), this Court countenanced restrictions on alien land ownership, but without endorsing state-mandated restrictions on U.S. citizens' rights. Respondents' reliance on *Oyama v. California*, 332 U.S. 633 (1948), is startling since the Court there *struck down* a state law which restricted land ownership on the basis of alienage. *See* Resp. Br. at 20.

Circuit in this case. See *Flores de Otero*, 426 U.S. at 604-06.

The Ninth Circuit's opinion departs from this Court's precedents and would establish a dangerous new rule: that the United States government may dispense with the most basic rights of U.S. citizens by mutual agreement with another sovereign or semi-sovereign entity. The Ninth Circuit's endorsement of a racial classification here stands as an invitation to its expanded use in future agreements with the territories such as Guam. Pet. at 17-18 n.10. Further, the same logic which supports land alienation restrictions here would support curtailment of free speech, arrest without cause, detention without trial, taking without compensation, and so forth in the territories, whenever vaguely defined considerations of "national interest" or "foreign policy" are advanced in connection with an ill-conceived "international obligation" of the United States. Indeed, the respondents' and the Ninth Circuit's argument logically would support negotiated curtailments of U.S. citizens' civil liberties in foreign lands as well. *Contrast, e.g., Reid v. Covert*, 354 U.S. 1 (1957) (U.S. citizens enjoy constitutional protection overseas). Such a precedent should not stand.

History teaches that racial classifications often are the remedy of choice but seldom solve the problems used to justify them. NMI's racial landholding restriction is a case in point. The Covenant negotiators chose to take the easy route of racial preference rather than confront the complex issues that every society faces in deciding the amount and level of acceptable economic development and change. The classification used here was neither necessary nor

sufficient to achieve the goal of protecting culture and traditions. Indeed, respondents never were asked to show that racial discrimination would substantially advance goals of protecting NMI culture and traditions. Nor could respondents have shown such a relationship. InterPacific Amicus Br. at 15-19. To the contrary, respondents' brief eloquently portrays the arbitrariness and ineffectiveness of the racial restriction in attempting to preserve traditional ways. *See* Resp. Br. at 26-27 (noting open door policy and rapid economic developments and commercialization of NMI).

Proper equal protection scrutiny would have revealed that race-neutral alternatives—including a zoning plan or other limitations on the sale, lease, or development of land—would have worked more effectively in protecting indigenous family structures, culture and mores. By disdaining such analysis, the Ninth Circuit not only departed from the precedents of this Court and established a dangerous new precedent; the court failed to advance the stated goals of the restriction. Simple adherence to this Court's precedents would have avoided this perverse result.

II. THE LOWER COURT DEPARTED FROM THIS COURT'S PRECEDENTS IN HOLDING THAT INTERNATIONAL OBLIGATIONS MAY EXCUSE INFRINGEMENTS OF FUNDAMENTAL RIGHTS

Contrary to both the Ninth Circuit and the Respondents, the Bill of Rights limits the Government's authority to enter into agreements even when the other party is another sovereign nation. *See Boos v. Barry*, 485 U.S. 312, 324 (1988) (" 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which

is free from the restraints of the Constitution' "), quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957); *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1988), *cert. denied*, 489 U.S. 1087 (1989); *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984).

Moreover, the restriction here is not part of an "international obligation" of the United States. As respondents acknowledge, the Covenant is an instrument of political union, not a treaty, by which "the Northern Marianas became part of the United States of its own free will, freely expressed, and not an acquired possession, like Guam. . . " Resp. Br. at 7 n.6; *see also* Covenant To Establish a Commonwealth in Political Union with the United States of America ("Covenant") § 903, *reprinted as amended in* 48 U.S.C.A. § 1681 (West 1987). There is no support in this Court's precedents for the notion that Congress may create a political union between NMI and the United States, with the NMI under its sovereignty, but deny United States citizens there the fundamental guarantee of equal protection of the laws.

Respondents raise the specter of the Covenant unraveling as a result of any finding that Covenant § 805 is unconstitutional. Resp. Br. at 10-11, 28. Even if this were a real prospect, it would not necessarily excuse a denial of U.S. citizens' fundamental rights in the NMI. *See* § I, *supra*. Nor does the record justify the lower court's evident assumption that the US-NMI relationship somehow would come unglued as a result of a court-ordered modification to conform the Covenant and the Constitution of the Northern Mariana Islands to the Constitution of the United States.

In fact, the NMI was well aware of the possibility that the land alienation restrictions mandated by Cov-

enant § 805 and Article XII of the NMI Constitution might be challenged in federal courts and ultimately held unconstitutional. *See generally* Briefing Papers for the Delegates to the Northern Mariana Constitutional Convention; Briefing Paper No. 12, Restrictions on Land Alienation at 10 n.5 (1976) ("Section 501 attempts to insulate § 805 from the effects of otherwise applicable portions of the United States Constitution but it is not clear that the courts will give effect to § 501 because American courts are reluctant to exempt American governments from limitations on their own powers."); Covenant § 903 ("Nothing herein shall prevent the presentation of cases or controversies arising under this Covenant to courts established by the Constitution or laws of the United States").

Moreover, although the legislative history indicates that the United States thought the land alienation restriction was important, the NMI negotiators evidently did not consider it fundamental and questioned the wisdom of making it mandatory. *See* Liebowitz, *Defending Status: A Comprehensive Analysis of United States Territorial Relations* at 592 (1989); InterPacific Amicus Br. at 18-19. Despite self-serving language in the Covenant, *see* Covenant § 105, one must view with skepticism any claim that the land alienation restriction was "fundamental" to the NMI. NMI's acknowledged open door development policy raises further doubts as to its commitment to the "fundamental" goals of § 805. Resp. Br. at 26-27. In any case, proper equal protection scrutiny would have enabled the lower court to explore the impact of a court-ordered modification on the U.S.-NMI relationship, and weigh that impact, if any, against petitioner's equal protec-

tion interests. The lower court's error lay in failure to conduct such scrutiny.

III. ARTICLE XII CREATES A RACIAL CLASSIFICATION

There is no merit in respondents' argument that the definition of "person of Northern Marianas descent" does not embody a racial classification. Resp. Br. at 11-17. The language of Article XII of the Constitution of the Commonwealth of the Northern Mariana Islands implementing Covenant § 805 ("Article XII") is plainly cast in racial terms. The negotiating history of the Covenant acknowledges that the classification was intended to be based on ancestry. S. Rep. No. 433, 94th Cong., 1st Sess. at 89 (1975) ("Under this section [Covenant § 805] the Government of the Northern Mariana Islands and [sic] until 25 years after the termination of the Trusteeship [will] regulate the alienation of permanent and long-term interests in property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent, *i.e.*, of Chamorro or Carolinian ancestry.").

The legislative history of Article XII reveals that, prior to 1966, only indigenous Chamorros or Carolinians qualified for trust territory citizenship and only such persons met the Article XII test. Resp. App. at 129a. Moreover, NMI-person status is passed on strictly by circumstances of birth or adoption. Resp. App. at 127a. Thus, children may be citizens of any country, and live anywhere, so long as they descend from "a person of Northern Marianas descent." Yet, a person whose parents are not 25% NMI person, on average, *e.g.*, a person of Palauan descent, will be ineligible to own land in the NMI, no matter what her citizenship or how long she has lived in the NMI.

See Resp. App. at 127a. In operation, the definition of "person of Northern Marianas descent" is clearly based on ancestry.[2]

As respondents point out, petitioner is a corporate citizen of the United States. Resp. Br. at 20 n.15. Like many other United States citizens in the NMI, petitioner is denied an equal status in the community because its shareholders and directors do not have the correct ancestry.

Respondents merely grasp at straws in suggesting that the racial classification in Article XII is somehow justified by analogy to special employment rules for members of Indian tribes "whose lives and activities are governed in a unique fashion." Resp. Br. at 16 (quoting *Morton v. Mancari*, 417 U.S. 535, 554 (1974)). *Mancari* involved an employment preference for Indians where "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities. . . " *Id.* at 554. Moreover, the limited employment preference was directed to participation by the governed in their government (the Bureau of Indian Affairs). Here, by contrast, "persons of NMI descent" are not governed in a manner distinct from those not of NMI descent, and the privileged "persons of NMI descent" are not

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[2] Respondents' argument that the restriction excludes Chamorros and Carolinians who live in Guam and the Federated States of Micronesia, as well as excluding long-term Commonwealth residents belonging to the non-privileged "polyglot population of the Commonwealth", merely demonstrates that the classification is both arbitrary and racial. Resp. Br. at 15. Certainly a restriction that applies to all members of race X who are residents of State Y is a race-based restriction. That it does not include members of race X who may live in other states does not remove the racial taint.

necessarily members of any "tribal entity" or community there. *Mancari* offers no shelter for the discriminatory purpose and impact of Covenant § 805 and Article XII which implements it.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MARYBETH HERALD
Counsel of Record
for Petitioners
2121 San Diego Avenue
San Diego, California 92110
Telephone: (619) 297-9700

JOE HILL
P.O. Box 917
Saipan, MP 96950